Islamic Medical Jurisprudence

Isam Ghanem

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Dedicated to
My beloved daughter, Amal

A Note on the Author

Born in Aden. After an introductory course in Engineering, graduated in Laws at Birmingham and awarded an M.A. in Area Studies and an M.Phil. in Law by London University. Lectured at the Polytechnic of Central London and Ahmadu Bello University, Nigeria etc., on International Law, Islamic Law and Arabic Studies.

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By the same author:
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Arabian Tears in British Waters forthcoming

Chapter 1

Canons of Construction in Islamic Jurisprudence

Islamic Forensic Medicine cannot be truly appreciated without an examination of the canons of construction and interpretation of Islamic jurisprudence itself.

Indeed, although Islamic law has religious foundations and connotations and despite the fact that it is viewed by many comparative jurists as a prime example of conservatism in interpretation, in the field of verses with scientific bearing or which lend themselves to an interpretation relating to science, there has been a tendency to review established interpretations in the light of laboratory findings and empirical discoveries.

However, the exercise of interpreting the scriptures in Islamic jurisprudence is not a philosophical one in that it starts by assuming what is accepted by Muslims as immutable truths which are not open to question. To a Muslim the issue of whether the Qur'ān is God-sent or whether the Prophet Muḥammad has simply genuinely believed it to be God-sent when in fact he may have composed it in the sincere hope of benefiting humanity, is not negotiable or open to debate. Therefore, to study the interpretation of forensic rules in Islamic law one has to examine in fact first what are the basic sources of Islamic jurisprudence and what rules govern interpretation and which areas are permissible for debate.

In this context one should not forget that until the 19th century the famous editor of al-Ustādh Journal in Cairo in 1892, 'Abdullāh al-Nadīm argued that the wearing of European trousers induces tuberculosis. In other words, what may be otherwise to a particular line of thought a valid area for analysis or at least academic discussion may be castigated as offensive, dangerous, or even agnosticism.

How are we to interpret verse 56 Chapter 4, the sūra of al-Nisā' (women) in terms of science if we do not examine first the place of the Qur'ān in Islamic jurisprudence and the way Islamic law evolved?

The verse in issue says "as often as their skin is wholly burned we shall give them in exchange other skins that they may taste the chastisement". The pain sensory centres in the human anatomy do in fact lie in the epidermis. But this was not common knowledge before the 20th century let alone 1400 years ago. One is faced with two objective approaches. The first is the point of view of the believer namely that it is no wonder that the verse contains such scientific wisdom for it is the words of God Almighty and the believer takes the view that for those who believe no proof is necessary and for those who do not no proof is enough. The other approach would be that of a philosopher who does not accept that the Qur'ān is God-sent. He takes the view that the interpretation of the verses is made to suit scientific facts to lend greater credence to the faith and the religious establishment. But then does this approach explain how a man with the background of the Prophet Muḥammad could have come up with verses which amongst other things fit scientific facts?

Another example is the ḥadīth of the Prophet Muḥammad "all flies are bound for hell except the bee". Insectologists have established that a bee is the same species as the fly, only in the 20th century. Again to the believer this is no surprise because the Prophet was divinely inspired by Allāh. To the non-Muslim free thinker this is merely a reflection of the Prophet's ability to observe a similarity between the bee and other flies.

Another example is in the sūra of the al-Zalzala (the earthquake) Chapter 99, verses 7 & 8 "and who so has done an atom's weight of good shall see it, and who so has done an atom's weight of evil shall see it". We now know that the atom is the precise weight measure which modern science employs. To the Muslim the question is rhetorical. But can one really explain the choice of the atom 1400 years ago by a person other than a messenger of a heavenly power? I suppose that a possible answer is that 'atom' only means 'atom' in modern science. For the reasons stated above, I shall first turn to outlining the sources of Islamic jurisprudence with minimal historical detail but with a reasoned explanation of the canons of interpretation and construction.

Before doing that I should point out that certain writers are opposed to 'aqlanat al-ghaibiyyāt or the rationalisation of the transcendental. In this they part company with the author, Mustafā Maḥmūd who has tried to rationalise and explain the invisible meaning of various verses. The scientific approach has been attempted

even by conservative authorities such as the late Sayyid Quṭb and al-Shaikh Muḥammad Mutawallī al-Sha'rāwī.

By the end of the 9th century A.D. the four major Sunnī schools (Ḥanafī, Mālikī, Shāfi'ī and Ḥanbalī) had come to subscribe to a common theory, namely that the primary sources of Islamic law are:—

Firstly, the Qur'ān which is the Muslim holy book containing the verses revealed by God to the Prophet through the angel Jibrīl (Gabriel). The revelation is by means of waḥy or divine inspiration.

Secondly, the Sunna which consists of the ḥadīth or oral statements of the Prophet, his practice and approvals. The Sunna or trodden path explains and supplements the Qur'ān.

Thirdly, Ijmā' or the juristic consensus of opinion of all competent jurists after the death of the Prophet. To the Ḥanbalīs an Ijmā' is not binding if reached more than one generation after the Prophet's death as it is nearly impossible to obtain the express agreement of every single qualified jurist after that stage of the spread of Islam. Jurists are agreed that an express Ijmā' is binding but Ḥanafī jurists, unlike other schools, consider the silence of jurists with regard to the vocal expression of a particular opinion as an effective implied agreement provided that there is evidence that the silent jurists are acquainted with the issue, and a reasonable period of time passed after the view was opined to enable other jurists to devote sufficient time for research and analysis. If both conditions are met, say the Ḥanafī jurists (who are numerically the largest single school), then silence is approval.

Fourthly, Qiyās or reasoning by analogy with the previous three sources. In its widest sense, the use of human reason in the elaboration of the law was termed ijtihād ("effort" or "exercise" of one's own judgement) and covered a variety of mental processes, ranging from the interpretation of texts to the assessment of the authenticity of Traditions. Qiyās or analogical reasoning, then, is a particular form of ijtihād, the method by which the principles established by the Qur'ān, Sunna, and Ijmā' are to be extended and applied to the solution of problems not expressly regulated therein. Qiyās (analogical deduction) must have its starting point in a principle of the Qur'ān, Sunna, or Ijmā' and cannot be used to achieve a result which contradicts a rule established by any of these three primary material sources. When a new case or issue presents itself, reasoning by analogy with an original case covered by the Qur'ān, the Sunna or Ijmā' is possible provided the effective cause or 'illa is common to both cases,

e.g., wine is prohibited by the texts, and the 'illa is intoxication. Therefore, spirits are prohibited by Qiyās because they also cause drunkenness. So the prohibition is extended by analogy.

In theory the majority of Shī'īs (to be found in Iran, Iraq, Lebanon, India and Pakistan) reject the four Sunnī schools and the doctrines of Ijmā' and Qiyās.

As far as Ijmā' is concerned, the Shī'īs believe that their Imāms have the sole right of determining what the believer shall do and believe, and that their accredited jurists can exercise personal opinion and that the Ijmā' is that of ahl al-Bayt or the 'Prophet's House'. But in practice the juristic consensus of Sunnī jurists is treated by the Shī'īs as a juristic opinion worth considering. As for Qiyās, most Shī'īs use the word 'aql (mind) instead. Some minority jurists use ra'y (opinion) for the same idea. The notable exception amongst the Shī'īs are the Zaidīs (of Yemen) whose jurisprudence is somewhat similar to Shāfi'ī fiqh except on the question of the Imāmate (or Caliphate). But they also employ 'aql.

Thus the majority of Muslims are agreed upon many issues. The differences are not so great when compared with the areas of agreement. Moreover, the jurists tend to disagree on subsidiary sources and academic issues. Since all schools made equally legitimate attempts to define the Sharī'a authoritatively and the jurist today compares the relative merits, Islamic jurisprudence has been enriched by a process of internal comparative law. Indeed, the ḥadīth says: "Difference of opinion within my community is a sign of the bounty of Allāh".

Subsidiary Sources[1]

Subsidiary sources relate to matters of public interest or benefit and are known as Istiḥsān, Sadd al-dharā'i' and Istiṣḥāb al-Ḥāl. Custom ('Urf and 'ādāt) as with nearly all legal systems is also a subsidiary source of law provided the custom is consistent with basic principles.

Those opposed to 'aqlanat al-ghaibiyyāt or the rationalisation of the transcendental argue that the danger in re-interpreting the scriptures in the light of scientific discoveries could entail a change in or invalidation of previous interpretations ad infinitum. Of course, this criticism is itself assailable on the ground that interpretations

1. For a fuller treatment refer to Outlines of Islamic Jurisprudence by the author.

have not been consistent in any case on certain issues. The criticism would also appear to overlook the fact that Islamic jurisprudence recognised the concept of naskh or abrogation or repeal even of the verses of the Qur'ān (albeit by the Qur'ān itself). Therefore no thesis on the interpretation of verses and ḥadīths of scientific bearing would be truly complete without an analysis of the concept of naskh.

Naskh

Al-Bukhārī relates in his ṣaḥīḥ (the most important compilation of the Sunna) that one of the Prophet's Companions Ibn al-Zubair asked Caliph 'Uthmān: "Why include verse 240 of the Sūra of al-Baqara for it has been repealed (by v.234 of the same Sūra)?". Caliph 'Uthmān replied: "I shall not effect any changes". This is consistent, of course, with v.64, S. Yūnus (Jonah – Ch.10): "There is no changing the words of God" and with v.42, S. Fuṣṣilat (Detailed or Distinguished – Ch.41): "Falsehood comes not to it from before it nor from behind it; a sending down from one All-wise, All-laudable".

Verses 6-7, S.al-A'lā (The Most High – Ch.87) have caused some consternation because they read as follows: "We shall make thee recite, to forget not save what God wills; surely He knows what is spoken aloud and what is hidden". However, the words "save what God wills" should be no source of confusion and although some jurists say that these words relate to tales about previous scriptures (shar' man qablanā), the view contained in the Tafsīr of the two Imāms (the Jalāl al-Dīns) (Cairo Bookshop, 1952 impression, p.508) is preferred here, namely that the Prophet was anxious to recite aloud as Angel Gabriel passed on to him the messages of Allāh for fear that he might forget and that these verses were assuring him that the repeating aloud in haste was unnecessary.

The Qur'ān was compiled after the death of the Prophet, the revelations having ceased only shortly before his death. The Sūras (Chapters) and verses were arranged by the Prophet's Companions headed by Zaid bin Thābit (the Prophet's amanuensis), and all the verses revealed to the Prophet are contained in the Qur'ān.

Thus it is possible to appreciate straight away that the Qur'ān was not revealed in bulk, and indeed many verses were revealed to provide ad hoc solutions, and some Qur'ānic verses could and did abrogate or repeal (effect a naskh of) some other Qur'ānic verses. Thus the Qur'ānic verse (v.277, S.al-Baqara – The Cow – Ch.2) which makes

it imperative upon all repudiated (divorced)[1] women to observe the 'idda (a waiting period, in the case of divorced women of three menstrual cycles, to find out whether the repudiated woman is pregnant and thus preserve pedigree) is modified by a later verse (v.49, S.al-Aḥzāb – The Confederate Tribes – Ch.33) which excludes from the observance of the 'idda those women who were repudiated before the marriage was consummated. Thus the application of the previous provision was restricted.

Similarly, v.240, S.al-Baqara (The Cow – Ch.2), referred to by Ibn al-Zubair, was repealed by v.234 of the same Sūra. The abrogated verse laid down that the 'idda period for a widow is one year (as in pre-Islamic Arabia) and the repealing verse made the waiting period 4 months and 10 days. This moreover illustrates the fact that the numbering of the verses is not based on chronological order.

All the major schools of jurisprudence accept abrogation of the Qur'ān by the Qur'ān and the juristic bases for such abrogation are the following verses:

v.101, S.al-Naḥl (The Bee – Ch.16) –
"And when We exchange a verse in the place of another verse – and God knows very well what he is sending down – they say, 'Thou art a mere forger!' Nay, but most of them have no knowledge."

v.106, S.al-Baqara (The Cow – Ch.2) –
"And for whatever verse We abrogate or case into oblivion, We bring a better or the like of it."

and v.39, S.al-Ra'd (Thunder – Ch.13) –
"God blots out, and He establishes whatsoever He will; and with Him is the Essence of the Book."

Accordingly, bearing in mind that the compilation of the Qur'ān did not leave out any verses revealed and emphasising yet again that the arrangement is not chronological, the cardinal rule of construction and interpretation in Qur'ānic exegesis is that the provisions must be construed as a whole. The Muslim point of view is that Allāh in His wisdom effected a happy matrimony between revolution and gradualism in that the Islamic ideology was clearly the final message from

1. Divorce is a judicial process, but dissolution of a marriage in Sharī'a could be judicial or extra-judicial. Therefore 'divorce' is not strictly speaking a precise translation of ṭalāq.

God for the benefit of humanity and in that this message was spread over a period of 23 years to enable man to appreciate it fully and adjust to the new commands which were meant for posterity and for all time:

v.106, S.al-Isrā' (The Night Journey – Ch.17) –
"And a Qur'ān We have divided, for thee to recite it to mankind at intervals, and We have sent it down successively."

v.32, S.al-Furqān (Salvation – Ch.25) –
"The unbelievers say, 'Why has the Qur'ān not been sent down upon him all at once?' Even so, that We may strengthen thy heart thereby, and We have chanted it very distinctly."

and verses 16-19, S.al-Qiyāma (The Resurrection – Ch.75) –
"Move not thy tongue with it to hasten it; Ours it is to gather it, and to recite it. So, when We recite it, follow thou its recitation; then Ours it is to explain it."

It should be appreciated that although many verses were revealed ad hoc to provide solutions for specific problems which presented themselves during the life of the Prophet Muḥammad, the message of Islam is accepted by believers as a salvation and guidance for humanity for all time and therefore when the verses were arranged, had they been arranged in a chronological order, then the implication may have arisen that the provisions contained in the text referred exclusively (i.e. only) to the incidents which were the causes of the revelation (asbāb al-nuzūl). However, asbāb al-nuzūl are still relevant to a proper interpretation of the Qur'ān and for its understanding in historical perspective.

A clear example of abrogation of the Qur'ān by the Qur'ān where chronological order was retained in the sequence of arrangement is however provided by the repeal of v.65, S.al-Anfāl (The spoils – Ch.8) by v.66 of the same Sūra.

V.65 reads:
"O Prophet, urge on the believers to fight, if there be twenty of you, patient men, they will overcome two hundred; if there be a hundred of you, they will overcome a thousand unbelievers, for they are a people who understand not."

V.66 reads:
"Now God has lightened it for you, knowing that there is weakness

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in you. If there be a hundred of you, patient men, they will overcome two hundred; if there be of you a thousand, they will overcome two thousand by the leave of God; God is with the patient.'"

Perhaps the clearest example of gradualism in the Qur'ānic legislation is the prohibition of wine, not only because it was so common in pre-Islamic Arabia, but also because in the nature of things historical evidence has shown that self-restraint is not best illustrated by the drinking habits of the human species. The first verse to be revealed on the subject was v.67, S.al-Naḥl (The Bee – Ch.16):-

"And of the fruits of the palms and the vines, you take therefrom an intoxicant and a provision fair. Surely in that is a sign for a people who understand."

This verse merely contrasted "a provision fair" (rizqan ḥasanan) with "an intoxicant", thus indicating the difference. Many writers do not, because of the onomatopoeic nature of the Qur'ān, trace the process of gradual legislation in the prohibition of wine to this particular verse. The next verse to be revealed on the subject of wine was v.219, S.al-Baqara (The Cow – Ch.2):-

"They question thee concerning wine and gambling. Say: 'In both is heinous sin, and uses for men, but the sin in them is more heinous than the usefulness'."

The third verse to be revealed on the subject was v.43, S.al-Nisā' (Women – Ch.4):-

"O believers, draw not near to prayer when you are drunken until you know what you are saying."

However, the prohibition is contained in the fourth and final set of verses, namely verses 90-91, S.al-Mā'ida (The Table – Ch.5):-

"O believers, wine and gambling, idols and divining-arrows are an abomination, some of Satan's work; so avoid it; haply so you will prosper. Satan only desires to precipitate enmity and hatred amongst you in regard to wine and gambling, and to bar you from the remembrance of God, and from prayer. Will you then desist."

These last two verses from the Sūra of al-Mā'ida were revealed in A.H.4, that is four years after leaving Mecca for Medina (17 years after the first revelation).

The Qur'ān used the verb 'avoid' when referring to idol-worship: v.30, S.al-Ḥajj (The Pilgrimage – Ch.22): "And avoid the abomination of idols and eschew the speaking of falsehood". Further, the ḥadīth condemned any dealing with wine and when v.90-91, S.al-Mā'ida were revealed, the people in whose vernacular the verses were revealed spilt all wine until the fluid was seen in the lanes of Medina. Therefore, it is not strictly speaking correct to argue that avoid in such cases is less than prohibition.

All the major schools are also agreed that the Sunna could and did in some cases abrogate the Sunna; for example the Prophet Muḥammad is reported to have said: "I have previously forbidden you to visit graveyards, but Muḥammad has now been permitted to visit his mother's tomb, so do visit graveyards for they remind you of the hereafter" (related by al-Tirmidhī). The reason why the Prophet prohibited Muslims from visiting graveyards in the early days of Islam was that pre-Islamic Arabia was predominantly pagan and the visiting of tombs was associated with idol-worship. However, when Islam was firmly established in the hearts of the Muslims, the Prophet felt that such visits may serve to remind the living of the next world. Another example is where the Prophet first prohibited the hoarding of meat for anniversary feasts, in particular the one of sacrifice, when there were people who were in desperate need of proper nourishment and their walk became feeble (al-Dāffa), and later permitted the storing of meat because the desperate situation was over, but in the ḥadīth stating that people may save meat the Prophet orders them also to be charitable (related by Aḥmad, al-Bukhārī and Muslim quoting Lady 'Ā'isha). Yet another example is when the Prophet prohibited the use of wine-containers, even though for lawful permissible drinks, the idea being to block and stop the ways and means to remembering and reverting to former practices. This is, in fact, an example of sadd al-Dharā'i', a subsidiary source of law. Later, however, the Prophet permitted the use of such containers when the prohibition caused hardship as the people in Medina had limited means (related by Aḥmad, al-Bukhārī and Muslim).

Whenever possible an interpretation which reconciles the provisions of different texts should be attempted and it is only when the provisions are patently contradictory that abrogation becomes inescapable. It is more or less elementary that the abrogating text is distinguished from the abrogated text by the context and by the

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historical evidence. Thus, if the records are clear that a particular text is the later in point of time, then the later abrogates the earlier. Sometimes the context makes the matter even more obvious, such as with the ḥadīth earlier mentioned which stated "I have previously prohibited you . . . but now you may". It will be noted that naskh only applies to provisions concerned with commandments and not to verses which relate the stories of earlier prophets.

Deeper waters are encountered when discussing what may be termed cross-abrogation, namely the relationship between the twin sources of the divine will, the Qur'ān and the Sunna.

The waters are further deepened by the concept of al-ḥadīth al-qudusī a special type of ḥadīth which although worded, according to the majority of jurists, by the Prophet (unlike the Qur'ān), the meaning or content is inspired by Allāh. An example of al-ḥadīth al-qudusī related in the ṣaḥīḥ of Muslim is: "Worshippers, I have prohibited myself from being unjust and ordained that injustice is ḥarām (taboo) amongst you, so do not be unjust to each other".

Most Sunnī jurists, as well as Shī'ī jurists, accept the doctrine of cross-abrogation. It is easier, of course, to maintain that the Qur'ān, being the words of Allāh, can repeal the statements of the Prophet. To justify acceptance of the possibility that the Sunna might have abrogated a Qur'ānic verse the majority argue that the Sunna partakes of the nature of waḥy (inspiration), being waḥy ghayr matluw or ilhām (inspiration which is other than recited), for Allāh says in verses 2-5, S.al-Najm (The Star — Ch.53): "Your comrade is not astray, nor speaks he out of caprice. It is naught but an inspiration (or revelation) inspired (or revealed), taught him by one mighty in power, endued with wisdom".

When Muslims started to pray, the qibla (direction) was Jerusalem for the first sixteen and a half months of prayers after the migration to Medina. This practice was in the view of the majority abrogated by v.144, S.al-Baqara (The Cow — Ch.2): "Now we will surely turn thee to a direction that shall satisfy thee. Turn thy face towards the Holy Mosque i.e., Mecca, the qibla of Ibrāhīm (Abraham)." Another example of abrogation of the Sunna by the Qur'ān is in fact the peace treaty or truce of al-Ḥudaibiyya in the month of Dhū al-Qi'da, 6 A.H. between the Prophet Muḥammad and the remaining Meccan pagans (the tribe of Quraish). The truce provided that whoever

leaves Quraish for (Prophet)[1] Muḥammad without the permission of his guardian, (Prophet) Muḥammad was to return him to the guardian (see Imtā' al-Ismā' by al-Maqrīzī, vol.1 p.298). However, v.10, S.al-Mumtaḥana (The Woman Tested — Ch.60) modifies the obligations under the truce by providing: "O believers, when believing women come to you as emigrants, test them. God knows very well their belief. Then, if you know them to be believers, return them not to the unbelievers. They are not permitted to the unbelievers, nor are the unbelievers permitted to them. Give the unbelievers what they have expended; and there is no fault in you to marry them."

However, the great analyst of Islamic jurisprudence, al-Imām Muḥammad ibn Idrīs al-Shāfi'ī, who does not accept the doctrine of cross-abrogation, maintains (in his famous treatise, al-Risāla, in which he formulated the classical theory of the sources of the Sharī'a) that the change of qibla was associated with a change in the practice, i.e., to al-Shāfi'ī it was a case of abrogation of the Sunna by the Sunna, the Qur'ānic verses revealed being simply consistent with the later practice. Al-Shāfi'ī argued that the Qur'ān cannot abrogate the Sunna, because to recognise this possibility would be to nullify the explanatory role of the Sunna, and if a prior practice of the Prophet was in fact contradicted by a later Qur'ānic verse, then the Prophet would confirm such a change by a further Sunna. Al-Shāfi'ī refused to accept that the Sunna could be so abrogated for fear that the authority of the Sunna would become vulnerable to attack and challenge and its study would be neglected.

As far as abrogation of the Qur'ān by the Sunna is concerned al-Shāfi'ī argued that the Sunna cannot abrogate the Qur'ān because its function is to interpret the Qur'ān and not to contradict it. Al-Shāfi'ī supports his analysis by referring to verses such as v.101, S.al-Naḥl (The Bee — Ch.16) v.106, S.Al-Baqara (The Cow — Ch.2), v.39, S.al-Ra'd (Thunder — Ch.13), and v.64, S.Yūnus (Jonah — Ch.10) (quoted above). He also cites v.15, S.Yūnus (Jonah — Ch.10): "Say: 'It is not for me to alter it of my own accord. I follow nothing, except what is revealed to me'." Some jurists also pray in aid the following verses: v.38, S.al-An'ām (Cattle — Ch.6) "We have neglected nothing in the Book", and v.89, S.al-Naḥl (The Bee — Ch.16) "And we revealed the Book as an exposition for everything".

1. The brackets are to indicate that Quraish did not recognise the Prophet as a prophet.

Further al-Shāfi'ī does not consider naskh so much a matter of repeal of the previous text but instead considers the earlier text to have been intended impliedly to apply for a limited duration. The famous Ẓāhirī jurist, Ibn Ḥazm, in fact defines naskh (in al Nāsikh wa al-Mansūkh) as "the indication of the expiry of the applicability of the previous provision". As a result of the Ẓāhirī school being extinct, its views on cross-abrogation are uncertain. Kamāl al-Dīn al-Ḥullī in al-Nāsikh wa al-Mansūkh (1970 impression) maintained that the Ẓāhirīs reject cross-abrogation. Ṣ.Maḥmaṣānī in Falsafat al-Tashrī' fī al-Islām (the Philosophy of Jurisprudence in Islam, translated by F.J.Ziadeh, published by E.J.Brill, Leiden, 1961) on the other hand maintains that some followers of the Ẓāhirī school held the opinion that it was possible for the Sunna to supersede the Qur'ān on the basis that both are revelations from Allāh. However, Maḥmaṣānī does not explain abrogation of the Sunna by the Qur'ān!

Despite the fact that al-Shāfi'ī would, if necessary, be preferred by a Shī'ī jurist to the founders of the three other major Sunnī schools (Abū Ḥanīfa, Mālik, and Aḥmad bin Ḥanbal) as he traces his origin to Quraish (the tribe of the Prophet), on the issue of abrogation of the Qur'ān by the Sunna the Shī'īs are least in agreement with al-Shāfi'ī. For the Shī'īs maintain that infallibility and superhuman knowledge are qualities inherent in the Prophet by virtue of his being, whereas to the Sunnīs these qualities are merely a special grace from Allāh in that God reveals to him superhuman knowledge from time to time. Indeed, the Shī'īs credit their Imāms with infallibility and sinlessness and the possession of clandestine knowledge. The Sunnīs, on the other hand, keep closer to the Qur'ānic verse: "Say 'None in heaven and earth knows what is hidden but Allāh'." (v.66, S.al-Naml — The Ant — Ch.27).

Some Ḥanbalī jurists (Aḥmad bin Ḥanbal was after all al-Shāfi'ī's student) reject the notion that the Sunna could supersede the Qur'ān. They give the following reasons:

1. The Qur'ān is the essence and is inimitable;
2. The role of the Sunna is merely to supplement the Qur'ān;
3. v.15, S.Yūnus (Jonah — Ch.10), already quoted, makes it clear that it is not for the Prophet to change the rules of his own accord;
4. v.106, S.al-Baqara (The Cow — Ch.2), already quoted, makes it clear that a Qur'ānic verse may be superseded only by another Qur'ānic verse;

5. They invoke the ḥadīth; "Whatever is quoted in my name compare with the book of Allāh. That which conforms with it is my own, but that which does not was never uttered by me."

This Ḥanbalī view, however, is clearly only a variant Ḥanbalī view as eminent writers such as Muḥammad Abū Zahra in Uṣūl al-Fiqh (Arabic text, published by Dār al-Fikr al-'Arabī, Cairo, 1973) and 'Alī Ḥasballāh in Uṣūl al-Tashrī' al-Islāmī (Arabic text, 1971) make no mention of the Ḥanbalī variant view which agrees with al-Shāfi'ī on one of the two aspects of cross-abrogation. M.Ṣāliḥ in Maṣādir al-Tashrī' (Damascus, 1968) at page 131 makes it clear that two views on the matter are attributed to Aḥmad bin Ḥanbal. However, he also maintains that several Shāfi'ī jurists accept that a Sunna which has been transmitted by strong consecutive testimony could abrogate the Qur'ān.

Where the Sunna restricts the application of a Qur'ānic provision, al-Shāfi'ī, Ibn Ḥazm, al-Ẓāhirī, and some Ḥanbalīs view this as takhṣīṣ al-'ām (specifying the limits of a general provision) or taqyīd al-muṭlaq (restricting a provision otherwise couched in absolute terms) e.g., the Sunna specified the *right* hand in the case of the hadd (specified penalty) for theft. The Hanafi jurists and many Maliki jurists on the other hand consider such addition by one text (naṣṣ) of divine inspiration introducing a novel element to the provisions of another naṣṣ dealing with precisely the same issue as implied or partial naskh. An example is provided by the ḥadīth which says that the dead of the sea is ḥalāl (permissible), i.e., fish may be eaten even though it was not slaughtered, whereas other meats which may be eaten must have been slaughtered first: v.3, S.al-Mā'ida (The Table — Ch.5), the beginning of which reads: "Forbidden to you are carrion". In this context most jurists accept that fish is a meat.

The views of al-Shāfi'ī appear to be more logical and more in conformity with the view that the right to amend a legal rule lies with Allāh who made the legal rule in the first instance (Cujus est condere legem, ejus est abrogare).

However, three topics bring to the fore the issues involved in the various views on cross-abrogation. These are mut'a (temporary marriages), bequests and zinā (fornication and adultery).

Mut'a

Temporary or enjoyment marriages which normally last for three days were practised by soldiers in the early days of Islam. Historiographers are not agreed as to when this institution was declared ḥarām (prohibited). Some say that it was ḥalāl (permissible) until the battle of Tabūk (9 A.H.); some say the battle of Khaibar (7 A.H.); others such as al-Māwardī and al-Ḥāzmī and, according to some, even al-Shāfi'ī 'complicate' the matter further by saying that mut'a was impliedly acquiesced in, then prohibited, then expressly approved and then finally prohibited till doomsday. The more authentic view (related by Muslim, al-Nasa'ī, etc.) seems to be that it was prohibited for ever three days after the Muslims re-entered Mecca in 8 A.H. Even then, it seems that not all the Companions, for example Ibn 'Abbās and Mu'āwiya, became fully aware of the prohibition until the reign of the second Caliph, 'Umar.

The Sunnī view re Mut'a

To the majority of Sunnīs al-Sunna al-Taqrīriyya (the approval) permitting mut'a was abrogated by either (a) the Qur'ānic verses relating to marriage, ṭalāq (dissolution), 'idda (waiting period) and succession, for the verses do not admit of the concept of the institution of enjoyment or temporary marriages and therefore implicitly abrogated mut'a; or (b) the ḥādith which stated that mut'a is finally forbidden for ever. To al-Shāfi'ī it was the ḥadīth which abrogated al-Sunna al-Taqrīriyya and the Qur'ānic verses referred to were simply consistent with such prohibition.

Those jurists who actively disagree with al-Shāfi'ī over his rejection of cross-abrogation maintain that the Qur'ānic provisions abrogated the implied approval by the Prophet of temporary marriages, that it was then necessary for the Prophet to confirm such prohibition by an express statement (ḥadīth), which is precisely what al-Shāfi'ī argued would have to happen if the Qur'ān abrogated the Sunna. But, as explained earlier, to al-Shāfi'ī the prohibition of mut'a involved merely abrogation of the Sunna by the Sunna.

The Shī'ī view re Mut'a

Although the Shī'īs accept the doctrine of abrogation and cross-abrogation, they interpret the Qur'ānic verses differently, in particular v.24, S.al-Nisā' (Women — Ch.4): "Such wives as you enjoy thereby, give them their wages apportionate". The Shī'īs maintain

that the verb 'enjoy' in v.24 accommodates the concept of mut'a as well as marriage proper. The Shī'īs further (mainly the Ithnā 'Asharīs, but not the Zaidīs) argue that mut'a is ḥalāl and that it was Caliph 'Umar who, according to them, purported to prohibit it, basing such prohibition on his own ijtihād, being the independent deduction of some rule of law from the recognised sources. The Ithnā 'Asharīs (Twelvers) argued that even the son of Caliph 'Umar, 'Abd Allāh, stated that mut'a was ḥalāl. But in fact under the chapter dealing with al-Ḥajj (The Pilgrimage) in the compilation of the Sunna by Abu 'Īsā al-Tirmidhī, al-Tirmidhī relates that when 'Abd Allāh bin 'Umar opined that mut'a is ḥalāl, he was told: "But your father (Caliph 'Umar) prohibited it relying upon the ḥadīth".

Today mut'a is still practised in conurbations such as Ithnā 'Asharī Tehran, despite the fact that it is related[1] that Imām 'Alī (the fourth Caliph and the most meritorious successor to the Prophet in the opinion of the Shī'īs) accepted that mut'a was abrogated.

Bequests

Three texts are involved: v.180, S.al-Baqara (The Cow — Ch.2) — "Prescribed for you, when any of you is visited by death, and he leaves behind some goods, is to make testament in favour of his parents and kinsmen honourably — an obligation on the godfearing." This verse commands the making of bequests in favour of near relatives and is contradicted at least in part (if not wholly abrogated) either by verses 9-12 and 176, S.al-Nisā' (Women — Ch.4) (referred to as the Farā'iḍ verses) which allot specific portions of the estate to relatives, or by the ḥadīth of the Prophet which states: "No bequest in favour of an heir". To the majority of jurists this is either a case of abrogation of the Qur'ān by the Qur'ān or of the Qur'ān by the Sunna, but to al-Shāfi'ī the ḥadīth explains the Farā'iḍ verses by indicating that the system of specific portions had abrogated v.180, S.al-Baqara, at least[2] as far as those relatives who were actually

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2. The Sudanese judicial Circular No.53 of 1945, the Egyptian Law of 1946 and the Iraqi Law of 1959 have enacted that a bequest to an heir is no longer ultra vires as long as it does not exceed the bequeathable third. In the preamble to the Sudanese Circular and the Explanatory Memorandum to the Egyptian Law, juristic justification is confined to a reference to the Qur'ānic verse of bequests (i.e., v.180, S.al-Baqara) and, by implication, to

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entitled to specific portions were concerned. Al-Shāfi'ī argued that the first portion of the ḥadīth (which is often overlooked) makes it clear that the Farā'iḍ verses abrogated the verse of bequests as the ḥadīth starts by saying: "God has given to those entitled their due entitlements". To al-Shāfi'ī these words clearly refer to the system of specific portions. But early in the 20th century the Egyptian Muftī, al-Imām Muḥammad 'Abduh, maintained in Tafsīr al-Qur'ān (The Interpretation of the Qur'ān) that there is no evidence that the Farā'iḍ verses were revealed after the verse of bequests.

Zinā

Illicit sexual intercourse in Islamic Law is termed zinā and covers both fornication and adultery. It is at this point, namely the specified penalty (ḥadd) for zinā, that al-Shāfi'ī's otherwise more logical efforts to harmonise interpretation vis-à-vis repeal *seem* to *nearly* break down. The Qur'ān provides in v.2, S.al-Nūr (Light — Ch.24): "The woman and the man who commit zinā — scourge each one of them a hundred stripes". However, the Sunna, both the oral statements and the practice of the Prophet, after this verse was revealed laid down a more heinous prescribed punishment (namely stoning) for zinā committed by a muḥṣan, i.e., a married person. But even to render the translation as adultery would overlook the fact that according to some jurists the muḥṣan category includes also offenders who have ever experienced valid married life and who are not necessarily any longer married at the time of the act of zinā.

To the majority (al-jamhūr) of jurists (fuqahā') this is the example of abrogation of the Qur'ān by the Sunna, as it has been clearly related by Abū Dā'ūd al-Sijistānī quoting Ibn 'Abbās that a certain Mā'iz confessed twice before the Prophet that he committed zinā and the Prophet sent him away to start with, but Mā'iz returned and confessed twice again and the Prophet said: "Stone him for he has made four sustained confessions". But there is disagreement between narrators (ruwāt) as to the number of confessions made by Mā'iz bin

the opinion of Ithnā 'Asharī jurists who maintain that the verse of bequests was not completely abrogated by subsequent rules of inheritance and moreover that one version of the Prophet's ḥadīth continues with the additional words "except for the bequeathable third", and that the Prophet's dictum in any event might be construed as abolishing the duty, but not the right, to make bequests in favour of heirs. If this is a borrowing by Sunnī Law of Shī'ī provisions it is certainly not express.

Mālik al-Aslamī and al-Ghāmidiyya of Juhaina. Moreover, the Prophet did not actually say that there should always be at least four confessions although that view is tenable.

The proof of zinā is otherwise extremely difficult and zinā must be proved beyond a shadow of doubt, and not merely beyond reasonable doubt, as the testimony of four competent male eye witnesses to the very act is required, except that the Mālikīs regard the pregnancy of an unmarried woman as establishing a prima facie case, but evidence in rebuttal to prove innocence is admissible, e.g., that of rape.

This issue has been exploited to cast doubt upon the accuracy of the compilation of the Qur'ān. Alfred Guillaume, who was an Anglican missionary in the Middle East, argues as follows:

> "Again, there is a tradition from 'Ā'isha, the Prophet's wife, that a certain chapter which now consists of 73 verses once contained no less than 200, and that when 'Uthmān compiled the Qur'ān the missing verses could not be found. One of them was called the Verse of Stoning, and is said to have contained the order to stone a man or woman who had committed adultery. It cannot be affirmed with any certainty that this verse ever formed part of the Qur'ān; it is more likely that it was either a genuine ḥadīth of the prophet or a very early invention of one of his followers. The fact remains that this verse is said to have been part of the original Qur'ān. Many early authorities say so, and what is very significant is that the first Caliphs punished adulterers by stoning. This is still the penalty prescribed in Muslim law-books, whereas the Qur'ān (24:2) prescribes a hundred stripes. In this case there is not sufficient evidence in favour of abrogation to claim it as a proof." (Islam, Pelican, 1954, p.191)

However, even authors such as S.Maḥmaṣānī in The General Theory of the Law of Obligations and Contracts under Islamic Jurisprudence, (Arabic text, Beirut, 1972, at page 122) relate the tale, but without comment, that a verse ordaining stoning has been omitted from the Sūra of al-Aḥzāb (The Confederate Tribes — Ch.33) in the compilation but that the omission is linguistic and not substantive (lafẓan lā ma'nā). Maḥmaṣānī gives as the reference Tafsīr al-Kashshāf by Abū al-Qāsim al-Zamakhsharī, vol.3, p.225. The correct page number, however, at any rate as published by al-Halabī printing press in Egypt in 1966, is page 248. The entire story of the revelations and their

compilation makes such speculation doubtful. Moreover, al-Kashshāf reflects the thinking of the Mu'tazila. However, it cannot be denied that the beauty of al-Shāfi'ī's analysis seems to give way over the issue of the penalty for zinā to the majority view that the Sunna can abrogate the Qur'ān. But all is not lost, for to al-Shāfi'ī the Sunna was effecting a takhṣīṣ (specification) or taqyīd (restriction) and not a naskh (abrogation or repeal). This is why it is not accurate to talk of al-Shāfi'ī's analysis breaking down over the issue of the ḥadd for zinā.[1]

The Qur'ānic penalty of 100 lashes continues to apply, where the evidential requirements can be satisfied, to zinā by a non-muḥṣan (which could be translated as fornication if one ignores the controversy concerning whether the label 'muḥṣan' applied to a person who, although not married at the material time, nevertheless experienced a valid marriage at an earlier point of time). Al-Shāfi'ī could therefore argue that all that happened was that the Qur'ānic verse specifying 100 lashes was meant to apply for a certain period of time after which it lapsed vis-à-vis a muḥṣan (or muḥṣana, feminine of muḥṣan), and it continued to apply to the non-muḥṣan as it was restricted, but not abrogated or repealed, by the Sunna which specified stoning as the ḥadd in the case of muḥṣans.

Perhaps no subject in the entire field of Islamic jurisprudence demands such precision of expression, command and mastery of language, clarity of thought and depth of analysis as the subject of naskh. In fact a proper study of fiqh al-sīra (or the life of the Messenger) and the requisite knowledge of Islamic legal history are required for a proper appreciation of naskh.

Quasi-abrogation

Since naskh is strictly a matter concerning the twin sources of divine will, the Qur'ān and the Sunna, I have decided to coin the term quasi-abrogation when discussing repeal as it relates to ijmā' and qiyās.

An ijmā' cannot abrogate a text (naṣṣ), i.e., a provision in the Qur'ān or Sunna. No ijmā' was reached or could have been reached except after the Prophet's death, i.e., after every text was revealed or stated, for ijmā' is based on the interpretation of the Qur'ān and the Sunna.

1. For example, Joseph Schacht, The Origins of Muḥammadan Jurisprudence, Oxford, 1950.

If an ijmā' is soundly founded on the texts, then it could not be repealed by a subsequent consensus; but if the ijmā' is merely based on public interest, then it may be repealed if the public benefit so requires. The main example of a repeal of an ijmā' is directly concerned with the re-opening of the door of ijtihād. In the tenth century A.D. jurists took a passive attitude towards interpretation and the exaggerated respect for the personalities of former jurists induced the belief that ijtihād and tafsīr had been exhaustively accomplished by scholars of peerless ability. But it was in the 13th century A.D. (the middle of the 7th century A.H.) that the Mongols, headed by Hulaku, the grandson of Genghis Khan, captured Baghdad and killed the 'Abbāsid Caliph al-Musta'ṣim in 1258 A.D. The Mamlūks (who overthrew the Ayyūbids in Egypt in 1250 A.D.) fought the Central Asian invaders and defeated the Mongols on more than one occasion (notably 'Ain Jālūt[1]), starting their campaigns as early as 1260 A.D. But it was only in 1302 A.D. under al-Sulṭān al-Nāṣir (a former army commander under the Ayyūbids) that the Tartars were finally defeated.

During the time Baghdad was under the mercy of the nomadic warriors of Central Asia the jurists in Iraq reached a juristic consensus (ijmā') to close the door of ijtihād (which they had not indulged in very much anyway since the tenth century A.D.). Only two leading schools rejected that ijmā' from its inception, namely the Shī'īs, to whom ijtihād is the prerogative of their Imāms, and the Ḥanbalīs (the fourth Sunnī school which was not very important at that time and became applicable only in Saudi Arabia when that kingdom was founded after World War 1). As Professor N.J.Coulson points out:

> "The Ḥanbalīs had consistently maintained the impossibility of any real consensus after the generation of the Prophet's contemporaries – on the ground that it had become impracticable to ascertain the views of each and every qualified jurist, and in the fourteenth century the Ḥanbalī scholar Ibn Taymiyya had himself claimed the theoretical right of ijtihād."
> (A History of Islamic Law, Edinburgh University Press, 1964).

However, the major Sunnī schools (the Ḥanafī, the Mālikī and the Shāfi'ī) had to find a juristic basis for re-opening the door of ijtihād. The ingenious jurist, al-Sayyid Jamāl al-Dīn al-Afghānī, in 1869 A.D.

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compilation makes such speculation doubtful. Moreover, al-Kashshāf reflects the thinking of the Mu'tazila. However, it cannot be denied that the beauty of al-Shāfi'ī's analysis seems to give way over the issue of the penalty for zinā to the majority view that the Sunna can abrogate the Qur'ān. But all is not lost, for to al-Shāfi'ī the Sunna was effecting a takhṣīṣ (specification) or taqyīd (restriction) and not a naskh (abrogation or repeal). This is why it is not accurate to talk of al-Shāfi'ī's analysis breaking down over the issue of the ḥadd for zinā.[1]

The Qur'ānic penalty of 100 lashes continues to apply, where the evidential requirements can be satisfied, to zinā by a non-muḥṣan (which could be translated as fornication if one ignores the controversy concerning whether the label 'muḥṣan' applied to a person who, although not married at the material time, nevertheless experienced a valid marriage at an earlier point of time). Al-Shāfi'ī could therefore argue that all that happened was that the Qur'ānic verse specifying 100 lashes was meant to apply for a certain period of time after which it lapsed vis-à-vis a muḥṣan (or muḥṣana, feminine of muḥṣan), and it continued to apply to the non-muḥṣan as it was restricted, but not abrogated or repealed, by the Sunna which specified stoning as the ḥadd in the case of muḥṣans.

Perhaps no subject in the entire field of Islamic jurisprudence demands such precision of expression, command and mastery of language, clarity of thought and depth of analysis as the subject of naskh. In fact a proper study of fiqh al-sīra (or the life of the Messenger) and the requisite knowledge of Islamic legal history are required for a proper appreciation of naskh.

Quasi-abrogation

Since naskh is strictly a matter concerning the twin sources of divine will, the Qur'ān and the Sunna, I have decided to coin the term quasi-abrogation when discussing repeal as it relates to ijmā' and qiyās.

An ijmā' cannot abrogate a text (naṣṣ), i.e., a provision in the Qur'ān or Sunna. No ijmā' was reached or could have been reached except after the Prophet's death, i.e., after every text was revealed or stated, for ijmā' is based on the interpretation of the Qur'ān and the Sunna.

1. For example, Joseph Schacht, The Origins of Muḥammadan Jurisprudence, Oxford, 1950.

If an ijmā' is soundly founded on the texts, then it could not be repealed by a subsequent consensus; but if the ijmā' is merely based on public interest, then it may be repealed if the public benefit so requires. The main example of a repeal of an ijmā' is directly concerned with the re-opening of the door of ijtihād. In the tenth century A.D. jurists took a passive attitude towards interpretation and the exaggerated respect for the personalities of former jurists induced the belief that ijtihād and tafsīr had been exhaustively accomplished by scholars of peerless ability. But it was in the 13th century A.D. (the middle of the 7th century A.H.) that the Mongols, headed by Hulaku, the grandson of Genghis Khan, captured Baghdad and killed the 'Abbāsid Caliph al-Musta'ṣim in 1258 A.D. The Mamlūks (who overthrew the Ayyūbids in Egypt in 1250 A.D.) fought the Central Asian invaders and defeated the Mongols on more than one occasion (notably 'Ain Jālūt[1]), starting their campaigns as early as 1260 A.D. But it was only in 1302 A.D. under al-Sulṭān al-Nāṣir (a former army commander under the Ayyūbids) that the Tartars were finally defeated.

During the time Baghdad was under the mercy of the nomadic warriors of Central Asia the jurists in Iraq reached a juristic consensus (ijmā') to close the door of ijtihād (which they had not indulged in very much anyway since the tenth century A.D.). Only two leading schools rejected that ijmā' from its inception, namely the Shī'īs, to whom ijtihād is the prerogative of their Imāms, and the Ḥanbalīs (the fourth Sunnī school which was not very important at that time and became applicable only in Saudi Arabia when that kingdom was founded after World War 1). As Professor N.J.Coulson points out:

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(1286 A.H.) explained to Muslim intellectuals in Cairo the importance of re-opening the door of ijtihād as an Islamic response to imperialism. Al-Imām Muḥammad 'Abduh, Afghānī's disciple, succeeded in 1898 A.D. in starting the era of neo-ijtihād, the re-interpretation of the principles embodied in the divine revelation as a basis for legal reform. Such a thesis, representing an outright break with the legal tradition of six centuries' standing, engendered violent controversy. Its supporters argued successfully that the doctrine of "the closure of the door of ijtihād" had not been established by an infallible ijmā' as alleged by the opponents of neo-ijtihād. Thus the ijmā' of the eminent jurists in Baghdad was set aside, for it was reached not only in a period of intellectual stagnation, but more importantly under fear that any ijtihād attempted during foreign domination (of the Mongol type at any rate) could lead to harmful consequences. By the end of the 19th century it was very much in the public interest that the door of ijtihād be re-opened and thus the ijmā' reached in Baghdad in the 13th century was repealed.

Since qiyās is reasoning by analogy with the provisions of the three original sources, the Qur'ān, the Sunna and the Ijmā', then qiyās could not conceivably repeal the sources from which it is derived. It is not unthinkable, however, that a qiyās may repeal another qiyās if in fact the two processes of analogical deduction were based on and derived from different texts. But, strictly speaking, in the ultimate analysis such abrogation would prove to be not so much a repeal of a qiyās by a qiyās but naskh of a naṣṣ by a naṣṣ.

Conclusion

An analysis of the sources and in particular of naskh not only introduces the canons of interpretation in Islamic Jurisprudence in general, but also should serve to show that re-interpretation is not anathema in Islamic law. If verses of the Qur'ān repealed other verses of the Qur'ān, is it really that unthinkable for jurists to contradict earlier jurists? For one of the major objections to 'aqlanat al-Ghaibiyyāt is its effect upon established interpretations. Moreover, the older interpretations never claimed to be divine or infallible. Nor is it an argument to a lawyer to say that 'aqlanat al-Ghaibiyyāt does not prove the truth of the night journey and accession of the Prophet into the heavens to meet Almighty (al-Isrā' wa al-Mi'rāj). Most people in life are satisfied to an appreciable degree by what may be called proof of a kind even though not absolute. For the

purpose of convicting one has to be absolutely sure at least in the case of Islamic criminal law. But for the purpose of believing in an idea enough is enough and circumstantial evidence is in fact accepted by most legal systems. Therefore, the argument by those opposed to 'aqlanat al-Ghaibiyyāt would not in fact appear to be acceptable to a common lawyer or civil lawyer. Even to an Islamic lawyer it may appear to give up the research ab initio i.e. that it is an argument that advocates an assuming attitude with preconceived conclusions. However, having said that one must recognize that these arguments are tempered by sincerity and profound belief in the revelations; so much so that this belief would appear to blind those who enjoy it to the need of many others for analysis and research[1].

1. M.Albār, a physician from Aden, who wrote in Saudi Arabia The Creation of Man (1981) (Arabic text), although writing with a religious zeal rather than scientific detachment has contributed to the interpretation of the texts in a manner consistent and compatible with obstetrics and gynaecology and has even shown that no less than the late Sayyid Quṭb has misinterpreted a particular verse but that al-Shaikh Al-Marāghī interpreted it correctly 30 years before Sayyid Quṭb. This explodes further the misunderstanding and misconception that there has ever in fact been an agreed interpretation on these matters. It also goes to show that 'aqlanat al-ghaibiyyāt has been accepted even by conservative authorities.

Chapter 2

Islamic Forensic Medicine: General

On the occasion of the passing of 1400 years since the hijra from Mecca to Medina it is worth examining the effect of scientific discoveries since that date on the interpretation of the scriptures.

Many Muslim jurists[1] in the classical days were also students of medicine and the Prophet Muḥammad linked the importance of philosophy and medicine in the ḥadīth; "Science is two-fold: theology and anatomy".

The Prophet's medical teachings are called *al-Ṭibb al-Nabawī*. Ibn Khaldūn, the 14th century social historian wrote in the *Muqaddimah* (an Introduction to History translated from the Arabic by Franz Rosenthal, Vol.III 2nd ed. Princeton 1967 page 150):

"The Prophet's mission was to make known the prescriptions of the divine law and not to instruct in medicine".

Ibn Khaldūn also said:

"If one likes to employ these remedies with the object of earning the divine blessings, and if one takes them with sincere faith, one may derive from them great advantages".

The canonical collections of al-Bukhārī, Muslim, al-Tirmidhī, Ibn Māja etc., all have their own *Kitāb al-Ṭibb* which is a chapter containing medical teachings and recommendations.

'Alī Ibn Sahl Rabbān Al-Ṭabarī (born around 810 A.D.) wrote a compendium of medicine in 850 A.D. entitled 'The Paradise of Wisdom' *(Firdaws al-Ḥikma)* and Part Two of the book treats of embryology and pregnancy.

Ḥunayn ibn Isḥāq (d.260/873) introduced constructions which

1. e.g., al-Ghazāli, Rhazes, Avicenna, Ibn al-Qayyim, al-Nawawī, Averroes, and Ibn Ḥajar al-'Asqalāni.

made Arabic an instrument capable of expressing novel complicated concepts. He succeeded in his task because he mastered the material languages of the time: Arabic, Persian, Greek and Syriac. The Caliph Al-Ma'mūn entrusted to him the responsibility for translating the major works of Greek medical science including those of Hippocrates, Galen and Dioscorides. Ḥunayn studied medicine under the Christian teachers of the day. Amongst his works which follow Greek medicine is his manual of Opthalmology with the first known diagrams on the anatomy of the eye. He also wrote Medical Questions and Answers which is an introductory manual written in the popular method of that period. It ought to be noted that although the Arabic translations of Greek works had their shortcomings when dealing with nomenclature, these translations were used for translations into Latin where Greek manuscripts were amiss e.g., Galen's works on Dissection.

Abū-Bakr al-Rāzī (latinised as Rhazes) (d.313/925) wrote *Kitāb al-Ṭibb al-Manṣūrī* (Liber medicinalis al-Mansorem) and *Kitāb al-Ḥāwī* (Continens). Rhazes was an important philosopher. Al-Rāzī gave a clear description of both smallpox and measles in his famous medical work known in Latin as De variolis et morbilis and sometimes as Liber de pestilentia. This book is original in that it is based on personal observations, patient deductions and it is the first treatise in existence on infectious diseases. As late as 1748, Thomas Stack of London wrote A Discourse on Small Pox and Measles to which he annexed, a Treatise on the Same Diseases by the Celebrated Arabian Physician, Rhazes. In 1768 there emerged the memoirs of a Dutch pastor named Chais in which he wrote that an ambassador from Morocco had said publicly, in 1738, 60 years before Edward Jenner, that inoculation against smallpox was common practice in Tripoli, Tunis and Algiers. A window in the Chapel of Princeton University in America represents al-Rāzī holding Kitāb al-Ḥāwī which is perhaps sufficient indication of his eminence in the history of culture. The medical school in Paris also decorates its walls with his portrait.

Al-Rāzī was born in al-Ray near Tehran in 258 A.H./865 A.D. He started his career as a lutanist and when he studied the effect of music on the sick he developed an interest in medicine. He was cultivated by the 'Abbāsid Caliph al-Mu'taḍid whom he helped with the location and setting up of the famous bimarstan (hospital) in Baghdad, and by the Samanite King al-Manṣūr after whom al-Kitāb al-Manṣūrī was named and remained as a reference in Europe till the 17th century.

'Alī ibn al-Abbās al-Majūsī (died around 990 A.D.) wrote *inter alia* on child-birth and anatomy and his system of medicine entitled *al-Kitāb al-Malakī* (the Royal Book) was diligently studied until the appearance of Avicenna's *Qānūn*.

'Abu 'Alī Al-Ḥusayn ibn 'Abd-Allāh ibn Sinā (in Latin, Avicenna) was born near Bukhārā in 980 and died in 1037 in Hamadhān. He studied Law, Logic, Mathematics, Medicine, etc. After several disturbed social moves due to political reasons he settled in Jurjān where he wrote his main work, *Kitāb al-Qānūn fī al-Ṭibb* (The Canon of Medicine), which won the highest esteem in the East and in the West.

Ibn al-Nafīs in an annotation of Avicenna's canon in the 13th century (d.687/1288) in Cairo gave an exact description of the small or pulmonary circulation nearly three centuries before its discovery by Michael Servetus (1556) and Rinaldo Colombo (1559). In this, in fact, he disagreed with both Galen and Avicenna.

Abu al-Walīd Muḥammad ibn Aḥmad ibn Rushd (in Latin, Averroes) was born in Cordova in 1126. He was a jurist and worked as a state official in Cordova and Marrakesh and died in 1198. His principal work is *Kitāb al-Kulliyyāt* (Colliget). He opined that philosophers are more competent than doctors on medical issues of a *general* nature. Ibn Rushd is better known amongst western Christian philosophers for Averroism or his interpretation of Aristotle reconciling reason and faith, and asserting the superiority of reason over knowledge founded on faith, which upset the orthodox. Averroists have sometimes been credited with the theory of 'double truth' which maintains the existence of two contrary truths, one taught by reason, the other commanded by faith (quasi sint duae contrariae veritates).

Islamic medicine spread in the West also partly as a result of translation from Arabic into Latin by Constantinus Africanus who left Tunis for Italy in the middle of the 11th century.

Moreover, although Toledo was captured by the Christians in 1085 many Arabic-speaking Muslims remained and Toledo became a translation centre.

E.G.Browne opined in Arabian Medicine (1921, Cambridge, reprinted 1962, London) that "the Qur'ān, apart from some mention of wounds and a vague popular embryology, contains hardly any medical matter". But by the 1960s research had suggested that the Qur'ān's hidden meaning is infinite and hence may encompass all

advances in human knowledge. Dr. Ḥāmid al-Ghawābī's Arabic treatise *"Between Medicine and Islam"* (posthumously published in 1967 by the Egyptian authorities) is based on the life-time experience of a consultant gynaecologist and obstetrician.

In the Sura of 'The Resurrection' *(al-Qiyāma)* (Ch.75) v.3 and 4 the Qur'ān reads:

> *"What does man reckon, We shall not gather his bones? Yes indeed; We are able to shape again his fingers."*

Finger-prints are impressions of the balls of the fingers and thumbs. A primary classification is based on the arrangement of the lines of the skin pattern into one of four general types. The principal lines fall into arch, loop, whorl, or composite form: loops may open towards either the radial or ulnar side, permitting a further broad subdivision. Enumeration of lines between, say, the core and delta of whorl and the composite forms, and of the precise situation of branching and fusion provides divisional detail. Final individuality lies with the exact position and shape, on these lines, of ridge pockets or indentations caused by the pore sites. Professor Keith Simpson wrote in *Forensic Medicine* (1969):

"The individuality of the finger-print never changes though scars may disturb it. Attempts to deface this tell-tale label of identity by deep cuts only add more defacing details to the print . . . Galton estimated that the chance of two prints from different fingers being identical was less than one in sixty-four thousand millions – some thirty-times the world population. It is perhaps more significant that never yet, in the world's crime records, have identical prints come to light unless from the same finger."

Al-Ghawābī argued that the Sūra of 'The Resurrection' (*al-Qiyāma*) (Ch.75) referred to the fingers because they are the part of the body which possesses characteristic individuality, and that the verse indicated this technique some twelve and a half centuries before it was first discovered in 1884 by the forensic scientists of England. It is along these lines that the meaning of the Qur'ān has been described as infinite. This is, of course, a Muslim point of view.

The ḥadīth states that breaking the bone of the dead is commensurate with breaking the bone of the living, but nevertheless some Mālikī and Shāfi'ī jurists take the view that under conditions of utter compulsion a person may be allowed to eat the flesh of dead humans

if the necessity is such that he would die if he were to observe the prohibition.

The International Islamic Conference held in Malaysia in 1969 permitted transplants from the dead to the living where medical benefit would accrue and the donation is either under the will of the donor or with the authority of his executor.

These matters were referred expressly to the Muftī (jurisconsult) of the Arab Republic of Egypt and there are various juridical opinions, for example, 212 of 14th February 1959 and 173 of 3rd February 1973 and 188 of 5th February 1974 and 190 of 5th March 1974 (all contained in the Register of Juridical Opinions No.105). The salient points of the juridical opinions pronounced are to the effect that in the case of deceased persons with no known relatives their bodies may be dissected for forensic and educational purposes as well as for surgical purposes, i.e. transplants. In the case of deceased persons with known relatives permission should first be taken from those relatives. (*Legal Problems Raised by Transplants* by Ḥusām al-Dīn Al-Aḥwānī, 1975, Egypt.)

However, oddly enough Islam in France, in the heart of Western Europe, has been far more conservative and the Director of the Islamic Centre of the Paris Mosque has come out against heart transplants and this, in turn, was reflected in the resolution of the French Ministry of Health which disallowed the removal of any part from the body of a dead Muslim because of the religious circumstances of the Muslims, but in fact the juridical opinion of the Director of the Islamic Centre of the Paris Mosque was largely based on the view that heart transplants are not sufficiently advanced scientifically and tend to have a publicity dimension which outweighs their scientific value.

E.G.Browne in *Arabian Medicine* said that dissection was probably never practised by the Muslims, but the 14th century Ḥanbalī jurist, Ibn Qudāma, wrote in *Al-Mughnī*:

"The various parts of the human body may be lawfully sold".

M.S.Madkūr in *Islam, the Family, and Society*, (Arabic text: 1968, Cairo) maintains that since any part of the live body may be sold, then it is *a fortiori* permissible to use some part of a deceased person for the benefit of the living. This was, in fact, the gist of his juridical opinion in *Al-Abrām* (20 September, 1968) on the issue of heart transplantation.

The Embryology mentioned in the Qur'ān is difficult to comprehend, but it is around such complexity that both the Qur'ān's supremacy and controversial nature (i.e., controversial to non-Muslims) revolve.

The Creation of Man is a recurrent theme in the Qur'ān. It is instructive to quote by way of illustration various verses from certain Sūras, which describe creation:

From the Sūra of 'The Believers' (*al-Mu'minūn*) v.12-14 Ch.23:

"We created man of an extraction of clay,
then We set him, a drop, in a receptacle secure,
then We created of the drop something which clings[1]
then We created of the thing which clings a tissue
then We created of the tissue bones
then We garmented the bones in flesh;
thereafter We produced him as another creature."

From the Sūra of 'The Pilgrimage' (*al-Ḥajj*) v.5 Ch.22:

"We created you of dust
then of a sperm-drop,
then of something which clings
then of a lump of flesh, formed and unformed
that We may make clear to you.
And We establish in the wombs
what We will, till a stated term,
then We deliver you as infants,
then that you may come of age;"

The Sūra of 'The Resurrection' (*al-Qiyāma*) contains the verses, (v.37 & 38) – Ch.75:

"Was he not a sperm-drop emitted?
Then he was something which clings"

and the Sūra of 'The Star' (*al-Najm*) states in verse 46:

"Of a sperm-drop, when it was cast forth."

1. As Maurice Bucaille points out in 'La Bible, Le Coran et la Science' (1976) something which clings is the correct translation of the word 'Alaq. A meaning derived from it 'blood clot' is a mistaken translation: man has never passed through the stage of being a blood clot. M.Albar in the Creation of Man (1981) (Arabic text) adopts the same linguistic analysis of the verb 'alaqa. Thus Prof.Arberry and Yūsuf 'Alī stand corrected by the French surgeon.

On examining these two verses in the original one sees that the Qur'ān has, by saying '*nuṭfatin min maniyin yumnā*' and '*min nuṭfatin idhā tumnā*' drawn a distinction between the gushing liquid and the motile spermatozoa contained within the liquid: it was only in 1680 A.D. that the microscope enabled scientists to verify this distinction.

But it is the Sūra of 'The Crowds' (*al-Zumar*) in v.6 – Ch.39 – which contains considerable scientific interest:

'He creates you in your mothers' wombs
creation after creation
in three veils of darkness'

Some interpreters either quote these verses as an example of vague embryology, or, if they are Muslim, as the three stages of darkness within the ovary, the Fallopian tubes, and the womb. But in fact the foetus whilst in the uterine cavity is surrounded by three protective sets of tissues, which appear to the naked eye as one membrane, but the modern surgeon is capable of distinguishing the three separate layers: the chorion, the placenta which is a specialized part of the chorion, and the thin amnion which covers the placenta and umbilical cord.

Yet another example of the substantive medical content of the Qur'ān is taken from the Sūra of 'The Night Visitant' (*al-Ṭāriq*) – Ch.86 – v.5 & 6:

'So let man consider of what he was created:
he was created of gushing water
issuing between the loins and the breast-bones.'

The vertebral column consists of a series of vertebrae extending from below the cervical (neck) vertebrae above to the coccyx (tail) bone below. The ribs form the chest. Sperm is formed in the seminiferous tubules in the testicles and the blood-supply to these comes from two arteries: internal and external. The internal one is a direct branch of the aorta and the external is a branch of a branch of the aorta. The aorta travels between the vertebral column and bones of the chest, i.e., between the back and the chest: 'between the loins and the breast-bones.'

Other examples were given at the outset in the introductory Chapter.

Probably the first Muslim adjudicator to employ forensic expertise,

in the widest sense of the term, was Imām 'Alī, for in some of his judgments one observes the use of elementary scientific analysis and testing.

A woman was extremely fond of one of the Anṣār and attempted to seduce him by various means, but when all these failed, she tried to implicate him in the criminal charge of rape. She took an egg and poured its white on her clothes and between her thighs. She then went to the Caliph 'Umar and claimed that the man in question had raped her. Caliph 'Umar wanted to penalise the young man, but the latter pleaded with him to investigate the basis of the accusation. So Caliph 'Umar consulted the Imām 'Alī. The Imām said: "Fetch me boiled hot water." He then poured it on the albumen until this was removed from the dress and collected in a pot. The Imām tasted the substance, and recognized its nature. This forced the woman to confess.

Although this case was decided in the final analysis on the basis of a confession, it nevertheless shows only too clearly that forensic medicine in an embryonic form has an age-old basis in the Sharī'a.

In another equally interesting (maternity) case two women appeared before the Imām 'Alī, one having given birth to a male and the other to a female, both deliveries having taken place at the same time and in the same locality. Both women claimed to be the mother of the boy. The Imām weighed an equal measure of the milk of each of them. He decided that the woman whose milk was the denser was the mother of the boy.

The above arbitral decision, naturally enough, is not regarded by jurists as a binding precedent or by any means as an accurate method of proof. Yet is is another example of the origins of medical jurisprudence in Islam, to which a large contribution was made by Ahl al-Bayt.

Another case mentioned by the jurists is that of a woman who alleged that her husband was impotent. After denying this, the man was immersed in cold water. The decision depended upon whether the external male organ contracted or became flaccid. If it became limp, the allegation was upheld. This practice, however, was not followed for long, as it was considered unreliable.

The role of Islamic medical jurisprudence is patently, of paramount significance, not least to doctors involved with the Muslim World.

Chapter 3
Medico – Legal Considerations in Family Law

It is the Islamic Law of Paternity and Gestation which is inextricably intertwined with medico-legal considerations; for W.Friedmann's assertion in 'Law in a Changing Society' (1964) that in polygamous societies, 'children are the desideratum; not too great an emphasis is placed on their source' is highly untrue of the Law of Islam, which attaches considerable importance to legitimate status.

Just as the issue of legitimacy and succession to power has not been resolved in the Middle East, the question of legitimacy in family law with consequences extending beyond succession is still a matter involving a wide range of considerations and disciplines including the reinterpretation of the scriptures in the light of modern science. Moreover, kinship and marriage are *basic* facts of life. They are about 'birth, and copulation, and death,' the eternal round that seems to depress the poet, but which excites, amongst others, the anthropologist and lawyer.

Paternity and Gestation, Normal Pregnancy

Fertilisation and Embedding of the Ovum

During coitus large numbers of motile spermatozoa are deposited in the upper vagina. A few enter the cervical mucus and ascend to the tube where conjugation of one of them with the ovum occurs. The fertilized ovum is carried down the tube by the cilia. Ovulation occurs at *about* the fourteenth day of the menstrual (28 day) cycle and the fertilized ovum reaches the uterine cavity about 7 days later. Symptoms and signs of pregnancy normally ensue. It may be added that the ovum is only capable of fertilisation for 36 hours.

Duration of Pregnancy

The average duration of normal pregnancy is 282 days from the first day of the last menstrual period, i.e., 268 days from ovulation. Whilst

it is accepted medically that the average length of gestation is 40 weeks, this is a mean of a wide range of figures and the limits extend from approximately 36 weeks to around 44 weeks. The period of gestation is usually calculated as though it begins on the first day of the last menstrual cycle. These cycles vary in length in different women and although the average is 28 days, they could extend to 68 days in exceptional cases. Ovulation takes place normally fourteen days before the succeeding cycle and it is at this time that fertilisation of the ovum occurs, but conception starts with implantation of the fertilized egg in the uterine wall usually around a week after fertilisation.

Theoretically one should count the gestation period as beginning on the day of fertilisation, but since this is so difficult to ascertain, the system described above is followed. Thus the combination of irregular and prolonged menstrual cycles (e.g., 68 days) with a prolonged gestation (e.g., 44 weeks) may result in exceptionally long pregnancy.

Some Legal Decisions

The question sometimes arises as to the length of the period of gestation which can be considered legitimate, when a child is born more than 280 days after the death or absence of the putative father. Under the Roman law the Decemviri established that a woman may bear a viable child at the tenth month of pregnancy. The French civil code provides that three hundred days shall constitute the limit of protraction for the child to be legitimate. A case was decided in October 1634 in the Supreme Court of Friesland, a province in the north of the Netherlands, in which a child born three hundred and thirty-three days after the death of the husband was pronounced legitimate.[1] In Britain and the USA there is no strict legal limit to the length of pregnancy; each case is considered on its merits. In the English Courts in 1921 a gestational period of 331 days was allowed, and a child born 364 days after the last possible cohabitation with the husband was also judged to be legitimate; but in 1948 a child born 340 days after cohabitation ceased was held to be illegitimate. The Scottish Courts have allowed a period of 305 days. The birth of a child in English Law was held to entail a period of gestation

1. G.Gould and W. Pyle, *Anomalies and Curiosities of Medicine*, Saunders, London, 1901.

between 174 days (Clark No.1 – 1939) and 349 days (*Hadlum* v. *Hadlum* – 1949). Both cases, however, turned on adultery.

On the Presumption of Legitimacy in Modern Legal Systems

The position in English Law was until recently that provided the spouses were not legally separated at the time of conception, there is a presumption that a child born or conceived in wedlock is legitimate until the contrary is proved beyond reasonable doubt. In Re Overbury (1955) the paternity of a woman who died intestate was in issue. Her mother's first husband died in January 1869. The mother married again in July of that year, and the intestate was born in September. It was held that she was the legitimate daughter of her mother's first husband, as there was no evidence adequate to rebut the presumption. There is no English authority indicating how the Courts might resolve a case in which a widow marries so soon after the death of her first husband as to render it impossible to say during which union the child was conceived. Now, however, The Family Law Reform Act, 1969, provides, *inter alia*, that the presumption of legitimacy is rebuttable by proof on a balance of probabilities. It may be added that there is no authority on the operation of the presumption of legitimacy in a criminal case. Part III of the Act contains provisions for the use of blood tests in determining paternity.[1]

It is useful for comparative study to bear in mind certain aspects of the position in Norway, France and the Soviet Union. Under the Norwegian Law of 1915, for example, the illegitimate child has the same relationship to the father as to the mother, and the search of paternity is a duty put upon the State rather than on the mother. In France the minimum period of gestation (as in Islamic law) is six months. In the Soviet Union the authorities have always been anxious to remove any stigma attaching to illegitimacy, and to equate the position of the illegitimate child with that of the legitimate child as far as possible. The Basic Principles of Marriage and Family Law, 1968, enacted that the parents of an illegitimate child

1. Since the mid seventies North America and Western Europe have employed an advanced blood grouping system which is highly specific, the HLA (Human Lymphocytes Antigens) system. Although the HLA typing is better known in its application to bone marrow and kidney transplants, its implications for the determination of paternity are also important. This subject is discussed in the last chapter in relation to Islamic Law. Another advanced technique is the MNSs.

may, if they agree, have their names registered as parents of the child, in which case they will stand in the same relationship to the child as parents who are married to each other stand in respect of legitimate children. If the father of a child born out of wedlock does not consent to being registered as the father, proceedings for the establishment of paternity may be commenced by the mother. Evidence of paternity, however, can be established only by showing either that the mother and the putative father were living together before the birth of the child, or that the putative father contributed towards the maintenance of the child, or that the putative father has admitted paternity.

The Pre-Islamic Position

Maternity was more important than paternity in early times and pre-Islamic Arabia worshipped female deities, such as Al-Lāt and al-'Uzzā and Manāt, who represented the Sun, the planet Venus, and Fortune, respectively. Among many of the tribes of *ancient* Arabia a form of polyandry had existed in which government was by matriarchy. There was a time before the coming of Islam, when the principle ruled that 'the child follows the bed', i.e., that the child reckoned paternity from the man, whoever he might be, who was married to its mother at the time of its birth. Islam modified the principle by declaring that a pregnant woman, when her husband dies or divorces her, cannot be remarried until the birth of her child, which is reckoned by Islamic law as begotten by him and as legitimate.

Where there has been any doubt about paternity, Islam followed the custom of the Jāhiliya in calling in a *qā'if*, a member of a class of seers whose business it was to assign paternity according to the child's physical features. In pre-Islamic times a prostitute who bore a child was allowed to declare who its father was. The traditionist Bukhāri declared that the man to whom the *qā'if* allotted a child had to acknowledge paternity of it. But the point is disputed.

The Status of the child in Islam

Cases of repudiation of children by parents are rare, for sons in particular are regarded as a precious possession. If, however, a husband, suspecting that a child borne by his wife is none of his, does not wish to acknowledge it, he must denounce it immediately it is born, and follow up his denunciation with an accusation of adultery against his wife in accordance with the procedure of the *li'ān*. By

this procedure the husband swears four oaths that the child is not his and finally invokes the curse of Allāh upon himself if he is lying. The wife may then take four contradictory oaths and also invoke the curse of Allāh upon herself if she is lying. But whether she does so or not only affects the question of her punishment for the criminal offence of *zinā* (illicit sexual relations).[1] The child has in any event been successfully disowned by the husband. However, the husband should not, although he *can* (on any ground), denounce the child simply on the ground that it does not resemble him in appearance. One of the greatest difficulties in the administration of all legal systems lies in distinguishing moral from legal obligations. The extreme case is quoted (Muslim, *Ṣaḥīḥ* – Stamboul, A.H. 1331) of a Bedouin Arab who came to the Prophet declaring that his wife had given birth to a negro child, and hinting that he wished to repudiate it. The Prophet, however, refused him permission to do so, and the remark of a commentator on the tradition is: "Difference even of colour does not prove adultery, and the woman's husband is not entitled to divorce her" (Nawawī); i.e., not entitled on that ground or for that reason.

The stigma which attaches to the illegitimate child in Muslim lands could be legally evaded in most instances, since it is very rarely that no argument at all could be found for assuming the validity of a particular marriage, at least in the Ḥanafī school. This becomes apparent in the analysis of void (*bāṭil*) and irregular (*fāsid*) marriages, which will be dealt with later on in this chapter.

The Minimum Period of Gestation

Under traditional Sharī'a law the fundamental criterion of legitimacy is the conception of the child during lawful wedlock. Hence, the determination of the legitimacy or otherwise of a child born to a woman during her marriage or after its termination is governed largely by the periods recognised as the minimum and maximum duration of gestation. The minimum period according to all schools of law is six months. This juristic consensus is founded upon the combination of the following verses:

From the Sura of *'The Sand-Dunes' (Al-Aḥqāf)* Ch.46 v.15:
"We have charged man, that he be kind to his parents: his mother

1 Reliance has been made on the phraseology of Professors Coulson and Anderson of the SOAS.

bore him painfully, and painfully she gave birth to him; *his bearing and his weaning are thirty months.*"

From the Sūra of *Luqmān*, Ch.31 v.14:
"And We have charged man concerning his parents – his mother bore him in weakness upon weakness, *and his weaning was in two years*".

From the Sūra of *'The Cow' (al-Baqara)*, Ch.2 v.233:
"*Mothers shall suckle their children two years completely*, for such as desire to fulfil the suckling."

The first indicates the duration of the bearing and weaning together, and the second and third verses the period of weaning alone, (i.e., 24 months out of the thirty months). Thus the period of bearing lasts for six months, and since human experience shows that this period is by no means the maximum period of bearing, six months was taken to be the minimum period of gestation. Some Ḥanbalī jurists, however, recognise nine months as the *normal* minimum.

The leading case on the minimum period of gestation was decided by the Caliph 'Umar. A woman gave birth to a baby after only six months of marriage. Caliph 'Umar intended to apply the *ḥadd*. Imām 'Alī intervened and cited the Qur'ānic verses: "Mothers shall suckle their children two years completely, for such as desire to fulfil the suckling" and "His bearing and his weaning are thirty months". Caliph 'Umar accordingly accepted that six months was the minimum period of gestation and that the child was therefore legitimate.

A most similar case was decided by Caliph 'Uthmān, (and accordingly to some authorities by Imām 'Alī). The facts were identical; but here Ibn al-'Abbās intervened and said: "If this woman were to prove to aid the Qur'ān, she would defeat your accusations." He then quoted the Qur'ānic verses: "His bearing and his weaning are thirty months" and "And his weaning was in two years." Accordingly Caliph 'Uthmān refrained from applying the *ḥadd*, and the blood relationship (*nasab*) with the husband was established. All the Companions who attended the forum accepted the decision.

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The Views of the Schools and the Presumption of Legitimacy

Islamic law ordains that:

1. A child born within six months of the marriage is presumed illegitimate. This presumption may be rebutted if the father acknowledges it (i.e., claims the child and declares that it is his, on condition that he does not state that it was the product of fornication).
2. A child born after six months of the marriage is presumed legitimate. This presumption may be rebutted if the father disclaims it.
3. A child born after the termination of marriage is presumed legitimate if born:

   In *Shī'ī law* within nine months according to the majority of the Shī'a, ten months according to some, and up to one year (not an hour more) according to others; (all lunar); but within four years according to the Zaidī Schools.

   In *Ḥanafi law* within two lunar years;

   In *Shāfi'ī and Ḥanbalī law* within four lunar years;

   In *Mālikī law* within five, six or according to a few even seven years. But some Mālikī jurists regard the maximum period of gestation as the median figure of one lunar year only, and *most* regard it as four lunar years;

   In *Zaidī law* within four lunar years. Al-Ẓāhiriya recognised a maximum period of nine months only.

According to 'Abd bin al-'Awwām the maximum period is five lunar years, and according to al-Ẓāhirī it is six (or seven) lunar years; Al-Laith bin Sa'd opined that it was three years. Abū 'Ubayd maintained that there was no upper limit, but his disciples put the maximum period at twenty lunar years.

It was Caliph 'Umar who decided the earliest known case on paternity and the maximum period of gestation. In this case a husband, on returning after two years' absence, was shocked to find his wife pregnant. Caliph 'Umar intended to have the wife stoned, that being the *ḥadd* in the Sharī'a for adultery (*zinā* by a spouse). However, Mu'ādh bin Jabal, a learned Judge, intervened and pointed out that even though an adulteress was liable to stoning, the foetus was not. Caliph 'Umar deferred the decision until the birth of the baby. On delivery it transpired that the baby born was a boy whose incisors were already formed and who resembled the husband, and

when the latter saw the baby, he exclaimed: "My son! In the name of Allāh."

Al-Kamāl bin Al-Humām opined that it was extremely unusual for a pregnancy to last for six months only, and Muḥammad Ibn 'Abdul Ḥakam, a Mālikī jurist, took the view that the maximum period is one lunar year only. Ibn Rushd (Averroes), the famous doctor and jurist mentioned in the previous chapter who was a fringe Mālikī, expressed the view that Ibn 'Abdul Ḥakam's opinion and Ẓāhirī doctrine were more consonant with reality and normality: (in his book: Bidāyat al-Mujtahid).[1]

The Ḥanafī view is based on a saying attributed to Lady 'Ā'isha, the youngest wife of the Prophet, that "the child does not stay in his mother's womb for more than two years, (even a split second more)". As Lady 'Ā'isha had no special personal knowledge of these phenomena to enable her to state her opinion so dogmatically, her saying is believed by Ḥanafī jurists to be a reiteration of a ḥadīth of the Prophet. This is the madhhab of Abū Ḥanīfa (and Al-Thuwarī).

The Shāfi'īs, Ḥanbalīs and many Mālikī jurists, and Caliphs 'Uthmān and 'Alī upheld the view that the maximum period of gestation is four years.

Al-Dār Al-Quṭnī has related that Al-Imām Mālik bin Anas said: "Our neighbour, the wife of Muḥammad bin 'Ajlān, is a lady of

1. Gould and Pyle in *Anomalies and Curiosities of Medicine*, Saunders, London, 1901, cite numerous cases of prolonged pregnancies, for example an infant who lived after a three years' gestation recorded in the Histoire de l'Academie des sciences, Paris, and a pregnancy of 476 days (approx. 16 months) resulting in the delivery of a male child weighing 13 lbs (as reported in the United States Medical Investigator, Chicago, Dec. 27, 1884). The longest case cited by Gould & Pyle was a birth after a four years' gestation related by Mercurialis. The Times of 13.5.1976 reported that a US woman carried a foetus for about 24 years without knowing it as a result of a rare abdominal pregnancy.

   The Sunday Times on 11th Oct. 1970 reported the story of a 20-month unborn baby speaking dubious Arabic in Indonesia. People listened by crouching and placing an ear to the mother's belly. According to some they could hear a reedy wailing sound, apparently of a baby crying and according to others the unborn baby was reciting holy verses.

   The Times of 13.5.1976 reported that a US woman carried a foetus for 24 years and that the foetus was discovered while the woman was undergoing an operation. The foetus calcified in her abdomen.

   M.Albar in The Creation of Man (1981) (Arabic text) states that Al Bilād newspaper on 24.12.78 reported the birth of a baby in Jeddah after six months of gestation weighing 600 grammes only.

veracity, and so is her husband. She gave birth to three children over a period of twelve years, each pregnancy lasting four years." It has also been suggested that Caliph 'Umar set the period for the return of a missing husband (*mafqūd*) at four years, after which, if there is no sign of his existence, his wife can remarry.

The Ḥanafīs questioned the reliability of sayings attributed to Mālik, and some of them argued that a woman may experience a very long period of purity (i.e., without menstruation) (ṭuhr) lasting two years, and *then* conceive, and accordingly a four year period of purity should not be taken to mean that the maximum period of gestation is four years.

The Ẓāhirīs, notably Dā'ūd al-Ẓāhirī, several Shī'ī jurists, and Ibn Ḥazm and Caliph 'Umar maintained that the maximum period of gestation was nine months. Ibn Ḥazm pointed out that the *ḥadīth* attributed to Lady 'Ā'isha was related by a certain Jamīla bint Sa'd who is an unknown person and therefore the *ḥadīth is* unproven because the *sanad* is lacking. Ibn Ḥazm also castigated the evidence relied upon by those jurists who maintained that the maximum period is four years. On the other hand, M.Mughniyya in 'Al-Aḥwāl Al-Shakhṣiyya' (1964) says that Imām Mālik's son, Muḥammad, had a son born to him after a four year pregnancy. Another modern author, Dr.'Abdul-Azīz 'Āmir in 'Al-Aḥwāl Al-Shakhṣiyya' (1961) maintains that if the *ḥadīth* attributed to Lady 'Ā'isha was authentic, then it would have been followed by the Imāms Aḥmad bin Ḥanbal, Al-Shāfi'ī and Mālik.

The rules relating to the maximum period of gestation, as Professor N.J.Coulson in 'A History of Islamic Law' (1964) says, "were not entirely due to the ignorance of the mediaeval jurists on matters of embryology, although belief in the phenomenon of 'the sleeping foetus' may well have contributed to their acceptance . . . There was the desire to avoid attributing the status of illegitimacy to children born to widowed or divorced women after the normal period of gestation had elapsed since the termination of their marriage; for the illegitimate child had no claims whatsoever, particularly as regards maintenance, upon its father. Again, for the Mālikīs at any rate, the birth of a child out of wedlock and outside the recognised periods of gestation after the termination of a marriage was *prima facie* evidence of fornication, which might entail the *ḥadd* penalty of lapidation, on the part of the mother; and the jurists had consistently demonstrated an unwillingness that these severe *ḥadd*

penalties should be applied except where there was proof positive of guilt. In short, humanitarian principles seem to have influenced the jurists to accept the possibility of protracted periods of gestation. As the question was bound up with the criminal law, their general attitude was that legitimacy should always be presumed unless circumstances made its non-existence certain beyond any shadow of doubt."[1]

In January, 1970, a spokesman for the British Medical Association, gynaecologist Mr. Patrick Steptoe, said that some women have a divided womb. A foetus could begin to develop in part of it and die without a miscarriage. It is then possible for a baby to grow in the other part of the womb and finally be delivered quite normally.

The unwillingness to adjudge a child illegitimate and to avoid a finding of *zinā* can also be seen on examining the different effects of *bāṭil* and *fāsid* marriages, as distinguished by Abū Ḥanīfa, Abū Yūsuf and Muḥammad al-Shaybānī, and other Schools generally hold that a marriage contract must be simply either valid or invalid). A marriage is *bāṭil* if it is vitiated in essence (*aṣl*), e.g., if there is no proper agreement, or the parties are incompetent. The contract is without effect; if intercourse takes place, the parties are subject to *zinā* penalties, and accordingly, the children, if any, are illegitimate. A marriage, on the other hand, is *fāsid* if it is vitiated only in attribute (*waṣf*), e.g., if the prescribed witnesses are absent. The semblance of validity (*shubha*) saves the parties from the *zinā* penalties and the children are legitimate *ab initio*, legitimation as such not being recognised by the Sharī'a. The "New Constitution for the Shī'a Imāmī Ismā'īlīs in Africa" of 1962,

1. G.H. Bousquet in 'Le Droit Musulman' (1963) wrote: "Enfants nés après la dissolution du mariage: si l'enfant peut être tenu pour conçu au cours du mariage, il est légitime. Mais quel est alors le délai le plus long de la grossesse? Nous trouvons ici la curieuse théorie, dite de l'*enfant endormi*, en vertu de laquelle celui-ci peut rester endormi, des années, dans le sein de sa mère . . . Les auteurs européens expliquent ces délais par le désir d'éviter les scandales. Cette explication rationaliste est de valeur douteuse, parce que souvent les populations croient à la chose. D'ailleurs, en vertu de la tradition, Mâlek se serait endormi durant des années dans le sein de sa mère. L'on peut citer des cas, où ce sont les héritiers du mari qui réclament un tel enfant, né de la femme du *de cujus*. Enfin, un grand nombre de circonstances medicales peuvent très bien expliquer que des femmes frustes croient de très bonne foi à leurs propres grossesses durant ces longs délais. Cette croyance a en tous cas l'avantage de diminuer le nombre des répudiations pour cause de stérilité."

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penalties should be applied except where there was proof positive of guilt. In short, humanitarian principles seem to have influenced the jurists to accept the possibility of protracted periods of gestation. As the question was bound up with the criminal law, their general attitude was that legitimacy should always be presumed unless circumstances made its non-existence certain beyond any shadow of doubt."[1]

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The unwillingness to adjudge a child illegitimate and to avoid a finding of *zinā* can also be seen on examining the different effects of *bāṭil* and *fāsid* marriages, as distinguished by Abū Ḥanīfa, Abū Yūsuf and Muḥammad al-Shaybānī, and other Schools generally hold that a marriage is *bāṭil* if it is two Companions of Abū Ḥanīfa; (the must be simply either valid or invalid). A marriage is vitiated in essence (*aṣl*), e.g., if there is no proper agreement, or the parties are incompetent. The contract is without effect; if intercourse takes place, the parties are subject to *zinā* penalties, and accordingly, the children, if any, are illegitimate. A marriage, on the other hand, is *fāsid* if it is vitiated only in attribute (*waṣf*), e.g., if the prescribed witnesses are absent. The semblance of validity (*shubha*) saves the parties from the *zinā* penalties and the children are legitimate *ab initio*, legitimation as such not being recognised by the Sharī'a. The "New Constitution for the Shī'a Imāmī Ismā'īlīs in Africa" of 1962,

1. G.H. Bousquet in 'Le Droit Musulman' (1963) wrote: "Enfants nés après la dissolution du mariage: si l'enfant peut être tenu pour conçu au cours du mariage, il est légitime. Mais quel est alors le délai le plus long de la grossesse? Nous trouvons ici la curieuse théorie, dite de l'*enfant endormi*, en vertu de laquelle celui-ci peut rester endormi, des années, dans le sein de sa mère . . . Les auteurs européens expliquent ces délais par le désir d'éviter les scandales. Cette explication rationaliste est de valeur douteuse, parce que souvent les populations croient à la chose. D'ailleurs, en vertu de la tradition, Mâlek se serait endomi durant des années dans le sein de sa mère. L'on peut citer des cas, où ce sont les héritiers du mari qui réclament un tel enfant, né de la femme du *de cujus*. Enfin, un grand nombre de circonstances medicales peuvent très bien expliquer que des femmes frustes croient de très bonne foi à leurs propres grossesses durant ces longs délais. Cette croyance a en tous cas l'avantage de diminuer le nombre des répudiations pour cause de stérilité."

contrary to all Islamic tradition, accepts the principle of legitimation *per subsequens matrimonium*.

Once the irregular attribute is discovered, the parties to a *fāsid* marriage must separate. The period of gestation, however, in a *fāsid* marriage is reckoned from the time of the (irregular) contract, whereas in the case of a perfectly valid marriage (*ṣaḥīḥ*) the period is calculated from the time of consummation, with the odd result that the child of an irregular marriage has a better arithmetical chance of being counted legitimate. This is at any rate the Ḥanafī doctrine. Indeed, Article 155 of the Egyptian Draft Law of Personal Status, 1967, gives express effect to this principle.

While the presumption of legitimacy begins to run in Ḥanafī law six months after the contract of marriage itself, according to the three other Sunnī schools (the Mālikī, Shāfi'ī and Ḥanbalī) it begins to run six months after the possibility of physical access between the husband and wife; while according to the Shī'a the presumption only applies throughout marriage if the spouses had physical access to each other at any possible time of conception.

Apart from legal presumptions, legitimacy may be validly established by acknowledgment (*iqrār*) if real paternity is possible. The child acknowledged must be at least twelve and a half years younger than the acknowledgor (the minimum age of puberty for a male is twelve years and the minimum period of gestation is half a year). Although an *iqrār* is governed by detailed rules, and takes various forms (it can be said to be *in rem* if by a father, and *in personam* if by a brother), these principles are not medico-legal in context. Suffice it to say that the doctrine of acknowledgment is not a mere rule of evidence, but is part of the substantive law of inheritance; that acknowledgment may be express or implied; that the person acknowledged must not be the offspring of *zinā*, as the acknowledgment must be of *legitimate*, not mere, sonship. But Isḥāq bin Raḥwayh, Ibn Taimiyya, Al-Ḥasan, and Ibn Sīrīn dispensed with this last proviso.

It is interesting to note that Abū Yūsuf held that if a *majbūb* married and his wife lived with him for a time and then gave birth to a child, the child (a son) was the legitimate issue of the husband (although *majbūb*), at any rate if he claims the child: [Alamgiri, Vol.I].

The rule as to acknowledgment of parentage is based on the

Qur'ānic verse in the Sūra of 'The Confederates' (*Al-Aḥzāb*) Ch.33 v.5:

"Call them after their true fathers; that is more equitable in the sight of God. If you know not who their fathers were, then they are your brothers in religion, and your clients."

Such acknowledgment is sufficient because the burden of the obligation in respect of the child rests especially on the father, and the latter's acknowledgment affects himself personally and is thus accepted without any verification by the mother. But it should be noted that if the acknowledgment is made by the mother, then paternity is established only if the father concurs or if the mother provides proof positive (*bayyina*). The evidence required must be the sworn testimony of two adult male (or one male and two female) witnesses of the highest moral probity (*'udūl*) and their evidence, moreover, must of course not contradict the facts.

But as Muḥammad Abū Zahra in 'Al-Aḥwāl Al-Shakhṣiyya' (1957) points out, the Mālikī *madhhab* demands an additional condition precedent to its recognition of an *iqrār*, namely that the acknowledgor must disprove contradictory circumstantial evidence. Thus if the child is known to be a waif, cogent evidence to the contrary must be furnished by the acknowledgor if he is to succeed in his claim to paternity. This Mālikī provision has in fact been translated more or less into law by the Egyptian Law of Waqf (Pious Foundations and Charitable Endowments), 1946, in Article 21. But unfortunately, juristically speaking, this Mālikī provision was not incorporated in Article 15 of Law No.25 of the Egyptian Law of 1929 which deals squarely with the law of paternity. This legislation and other Middle Eastern reforms will be examined in detail when discussing modern legal developments.

Verse No.5 from the Sūra of 'The Confederates' (*Al-Ahzab*) — Ch.33 — quoted above and verse 40 from the same Sūra:

"Muḥammad is not the father of any one of you men, but the Messenger of God, and the Seal of the Prophets:"

clearly prohibit the institution of adoption. Prior to these revelations the Prophet himself adopted Zaid Ibn Ḥāritha and Al-Aswad bin 'Abd Yāghūth Lilmiqdād, as adoption was widely practised in pre-Islamic times and early Islam. However, it must be borne in mind that Islam encourages (and rewards) fosterage and upbringing of

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waifs. The institution of *iqrār*, moreover, can result indirectly in *de facto* adoptions.[1] Adoption was not given legal sanction until 1851 in the U.S.A., 1923 in France and only in 1926 in England.

As for maternity, in Ithnā 'Asharī law, *unlike* Sunnī law, an illegitimate child is not lawfully related even to the mother. In both systems, however, a *li'ān*[2] (imprecation) does not sever the maternal tie, as the mother in such a procedure maintains legitimacy and whilst the repudiation of the child by the father successfully disowns it, as far as the issue of legitimacy is concerned, it remains unproven.

It was said by the Privy Council in a case dealing with a Chinese conjugal union that "a court may do well to recollect that it is a possible jural conception that a child may be legitimate though its parents were not and could not be legitimately married": *Khoo Hooi Leong* v. *Khoo Hean Kwee* (1926) A.C. 529, 543, per Lord Phillimore. There is, however, no substantive support for such conjecture in Islamic Law. Moreover, it must be constantly borne in mind that the penalties concerning adultery are virtually unenforceable and in practice simply preventive in nature. As Ibn Taimiyya put it in his treatise on Public and Private Law in Islam: "The penalty is never inflicted on the accused unless four witnesses have given evidence against him or unless he himself has testified four times that he has been guilty. This is the opinion held by a big number of jurists or

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Mulla in *Principles of Mahomedan Law* (1968) discusses retraction of the 'charge' of *li'ān*: "The effect of the decisions, excluding what are merely obiter dicta, would appear to be that a retraction of the charge by the husband at or before the commencement of the hearing disentitles the wife to a decree, but she is entitled to a decree if the retraction is made after the close of the evidence, or of the trial. The High Court of Bombay has expressed the opinion that retraction 'has no place in the procedure in British Courts'."

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The issue of a *mut'a* union are legitimate and entitled to inherit according to Ithnā 'Asharī Shī'ī authorities (Sharā'i' al-Islām); but the interesting Arabian custom of *mut'a* is forbidden by Sunnīs, Zaidīs and Fāṭimīs (including Khojas and Bohoras). On the other hand, the Imāmīs even go so far as to say: "The believer is only perfect when he has experienced a *mut'a*" (al-Ḥurr al-'Amilī).[2]

Another vexed question is the validity of 'tribal' marriages. The Ḥaḍramī jurist Ibn 'Ubaidillāh argued for their full validity provided they are based on genuine consent. 'Abd al-Raḥmān Sulaymān al-Ahdal, while Mufti of Zabīd, wrote a treatise in support of this view. Ibn 'Ubaidillāh asserted that both Dā'ūd al-Ẓāhirī and 'Aṭā maintained that neither the presence of the woman's guardian nor of witnesses was essential to a marriage, but that where a woman gave herself in marriage to a suitable husband this was a valid contract; and that al-Ramlī, but not Ibn Ḥajar, regarded this view as raising a sufficient *shubha* in such cases to avert the punishment for *zinā* and to secure the legitimacy of any children.[3] Sharaf al-Dīn al-Muqrī asserted that wording which conforms to the custom (*'urf*) of the locality is binding, where its purport is intelligible, even when used by one who knows the correct usage: and this is quoted even by Ibn Ḥajar (*al-Tuḥfa*, vii p.220).

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Again, if a Muslim claims a child as his slave and a Christian claims the same child as his son and the *bayyina* of both is equally strong, then the claim of the Christian is upheld, as it confers the status of a free person on the child: *Al-Hidāya wa Takmilat Fatḥ Al-Qadīr*, Part 6, pp.272-273.

Moreover, a dispute may be settled on the basis of more than one ground. This is exemplified by a Meccan case decided by the Chief Qāḍī, M.Al-Mustafā b. Al-Imām b. 'Abdul-Qādir Al-'Alawī. In this case a woman gave birth to a child on the 29th Muḥarram, 1362 A.H. (1362 A.H. = [622 + $\frac{97}{100}$ x 1362] A.D. = 1943 A.D.). On 29th Jumād al-Thānī, 1362 A.H. she was divorced, i.e., five months after the delivery of the child. Throughout these months the wife, Khadīja, was '*firāsh*'; four years later she gave birth to another child, not having remarried and having been completely confined to her former matrimonial chambers and surrounded exclusively by females throughout the material time. The husband refused to accept the second child as his. The Qāḍī stated the principle of *al-firāsh* according to the ḥadīth: "A child is attributed to the matrimonial bed in which he (or she) is born." The *firāsh* begins to run from the date of consummation of the marriage and ends at the expiry of the 'idda. But once the pregnancy of the wife is ascertained, the law lays down no maximum period during which delivery must take place. Thus, the child will be attributed to the husband regardless of the time of its birth. But in case of uncertainty as to pregnancy, there is a maximum of four years and if a child is born within this period it will be attributed to the husband. The judgment claimed that the theory of *irtikān* (sleeping foetus) is based on the historic four years pregnancies of the women of the tribe of Banī 'Ajlān. The Qāḍī maintained that these prolonged pregnancies were mentioned by the Imām Aḥmad bin Ḥanbal, whose doctrine is followed in Saudi Arabia. The child was thus held to be the legitimate issue of the marriage. Indeed, in another case in which the mother was Khadīja's

sister, a five year period of gestation was accepted.

Khadīja's case could have been decided on the basis of the *bayyina* afforded by the women attending her that she had no contact whatsoever with any man; therefore, the child could not have been adulterine and was accordingly legitimate.[1]

The fact that the maximum periods of gestation are mere presumptions is brought out very clearly in the Tanganyikan case of *Omar bin Mihombo v. Abdulla Ali* (Secretariat File 13879/82). Professor Anderson in 'Islamic Law in Africa' discussed this unreported case: "The normal Shāfi'ī rule, of course, is that a child born within four years of a woman's widowhood or irrevocable divorce is regarded as the legitimate child of her former husband unless she has either remarried (after claiming that her 'idda period has come to an end) at least six months before its birth or already given birth to a child during the intervening period. In a country where Islamic law was applied in its entirety such a rule would, no doubt, serve as a valuable protection for both mother and child. But in a country such as Tanganyika divorced wives who give birth to a child some two years after the dissolution of their marriage often vehemently maintain that this was a child of adultery, and therefore theirs alone, against their former husband's claim of paternity. In one case, for instance, a husband who had divorced his wife claimed a child who was born to her sixteen months later; while the woman's brother maintained that the spouses had in fact been separated for

1. In National Sailors' and Firemen's *Union* v. *Reed* (1926) Ch.536 the case on general strikes, two grounds were given for declaring them illegal: (1) general strikes are *ultra vires* the Union rules (Contract); (2) a general strike is illegal and therefore anything in support thereof is unlawful. The first ground was sufficient, but although the second one may be unsound, it was not necessarily *obiter*. In Khadija's case, the *bayyina*, which is by definition stronger than a presumption, was probably sufficient to decide the case and to constitute the *ratio decidendi*; but the gestational reasoning was sound, although to my mind it was *obiter* despite the fact that it occupied the greater part of the judgment.

Belief in the prolonged gestational periods may be laughable at first sight, but a specialist may take a more understanding attitude. A consultant gynaecologist was prepared to accept that a pregnancy may last for a few years in exceptional cases, when asked for an expert opinion by a court in Nigeria in the 1960's. It is instructive to bear in mind Pascal's dictum: "It is odd, when one thinks of it, that there are people in the world who, having renounced all the laws of God and nature, have themselves made laws which they rigorously obey . . ."

There are circumstances in which neither presumptions nor acknowledgments are decisive. Both traditionists, Al-Bukhārī and Muslim, relate through a chain of authorities (which include Ibn Shihāb Al-Zuhrī, 'Urwa, and Lady 'Ā'isha) that Sa'd bin Abī Waqqās claimed a boy to be the son of his brother, 'Utba, by his father's concubine. The Prophet himself was asked to settle the dispute, and on realising the strong resemblance of the boy to 'Utba, he awarded his custody to Sa'd.

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Moreover, a dispute may be settled on the basis of more than one ground. This is exemplified by a Meccan case decided by the Chief Qāḍī, M.Al-Mustafā b. Al-Imām b. 'Abdul-Qādir Al-'Alawī. In this case a woman gave birth to a child on the 29th Muḥarram, 1362 A.H. (1362 A.H. = $[622 + \frac{97}{100} \times 1362]$ A.D. = 1943 A.D.). On 29th Jumād al-Thānī, 1362 A.H. she was divorced, i.e., five months after the delivery of the child. Throughout these months the wife, Khadīja, was *'firāsh'*; four years later she gave birth to another child, not having remarried and having been completely confined to her former matrimonial chambers and surrounded exclusively by females throughout the material time. The husband refused to accept the second child as his. The Qāḍī stated the principle of *al-firāsh* according to the ḥadīth: "A child is attributed to the matrimonial bed in which he (or she) is born." The *firāsh* begins to run from the date of consummation of the marriage and ends at the expiry of the 'idda. But once the pregnancy of the wife is ascertained, the law lays down no maximum period during which delivery must take place. Thus, the child will be attributed to the husband regardless of the time of its birth. But in case of uncertainty as to pregnancy, there is a maximum of four years and if a child is born within this period it will be attributed to the husband. The judgment claimed that the theory of *irtikān* (sleeping foetus) is based on the historic four years pregnancies of the women of the tribe of Banī 'Ajlān. The Qāḍī maintained that these prolonged pregnancies were mentioned by the Imām Aḥmad bin Ḥanbal, whose doctrine is followed in Saudi Arabia. The child was thus held to be the legitimate issue of the marriage. Indeed, in another case in which the mother was Khadīja's

sister, a five year period of gestation was accepted.

Khadīja's case could have been decided on the basis of the *bayyina* afforded by the women attending her that she had no contact whatsoever with any man; therefore, the child could not have been adulterine and was accordingly legitimate.[1]

The fact that the maximum periods of gestation are mere presumptions is brought out very clearly in the Tanganyikan case of *Omar bin Mihombo v. Abdulla Ali* (Secretariat File 13879/82). Professor Anderson in 'Islamic Law in Africa' discussed this unreported case: "The normal Shāfi'ī rule, of course, is that a child born within four years of a woman's widowhood or irrevocable divorce is regarded as the legitimate child of her former husband unless she has either remarried (after claiming that her 'idda period has come to an end) at least six months before its birth or already given birth to a child during the intervening period. In a country where Islamic law was applied in its entirety such a rule would, no doubt, serve as a valuable protection for both mother and child. But in a country such as Tanganyika divorced wives who give birth to a child some two years after the dissolution of their marriage often vehemently maintain that this was a child of adultery, and therefore theirs alone, against their former husband's claim of paternity. In one case, for instance, a husband who had divorced his wife claimed a child who was born to her sixteen months later; while the woman's brother maintained that the spouses had in fact been separated for

1. In National Sailors' and Firemen's *Union* v. *Reed* (1926) Ch.536 the case on general strikes, two grounds were given for declaring them illegal: (1) general strikes are *ultra vires* the Union rules (Contract); (2) a general strike is illegal and therefore anything in support thereof is unlawful. The first ground was sufficient, but although the second one may be unsound, it was not necessarily *obiter*. In Khadīja's case, the *bayyina*, which is by definition stronger than a presumption, was probably sufficient to decide the case and to constitute the *ratio decidendi*; but the gestational reasoning was sound, although to my mind it was *obiter* despite the fact that it occupied the greater part of the judgment.

Belief in the prolonged gestational periods may be laughable at first sight, but a specialist may take a more understanding attitude. A consultant gynaecologist was prepared to accept that a pregnancy may last for a few years in exceptional cases, when asked for an expert opinion by a court in Nigeria in the 1960's. It is instructive to bear in mind Pascal's dictum: "It is odd, when one thinks of it, that there are people in the world who, having renounced all the laws of God and nature, have themselves made laws which they rigorously obey . . ."

[illegible]

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two years before the divorce, that the woman had aborted subsequently, and that the child under dispute was a child of adultery. On appeal the Governor's Appeal Board held that the four-year rule of Shāfiʿī law amounted to a mere matter of presumption and was a very different thing from saying that 'the child belongs to the husband' in such circumstances. 'It is clear to the Board that the law is concerned to *presume* legitimacy and not to *deem* it, and, where clear evidence is forthcoming that the child was not born of the union, then the presumption is rebutted'."

As for ascertaining the specific time of delivery (when in dispute), the testimony of one Muslim woman of high moral probity is accepted, this being an exception to the normal evidentiary rules, since virginity, childbirth and the like are supposed to be in *fiqh* within the exclusive knowledge of females. It is related that the Prophet, Ibn Abī Shaiba and Ibn Shihāb Al-Zuhrī accepted the testimony of the midwife (*qābila* or *dāya*) provided she was *'adla*. This is the Ḥanafī and Ḥanbalī position. Mālik and Ibn Abī Lailā insisted that two women must so testify, and Al-Shāfiʿī with characteristic reluctance for accepting the evidence of women, demanded the testimony of four such witnesses. In due course the evidence of a doctor who attended the delivery came to be recognised, provided he had the quality of *'adāla*.

The 'Idda[1]

The waiting period (*'idda*) serves three purposes:

1. to safeguard paternity;
2. to enable a husband to recall his wife after a hasty repudiation without the need for a fresh marriage contract;
3. to act as a sign of sorrow for the cessation of married life or as a sign of mourning on the death of a husband.

The Sūra of 'The Cow' (*al-Baqara*) — Ch.2 — states in *v.228*:

"Divorced women shall wait by themselves for three periods; and it is not lawful for them to hide what God has created in their wombs."

1. The Romans had a waiting period (Tempus lugeendi) of ten months which was applicable to the widow, but not the divorcee, although its basic aim was to prevent uncertain paternity. Article 228 and 296 of the French Civil Code set the waiting period also at ten months. In English law the decree nisi is not a *de jure* waiting period although it has a similar effect in practice.

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If the *ṭalāq* is revocable (*rajʿī*) and the husband dies during the wife's observation of the *'idda* of revocable divorce, then she must observe the *'idda* of widowhood, to commence as from the date of the death of the husband (i.e., no account is taken of the time she has already spent in the *'idda* of *ṭalāq*). If the *ṭalāq* is irrevocable, this does not apply, but if it is *ṭalāq al-fār* i.e., pronounced by a man in deathsickness), albeit in an irrevocable form, Imām Abū Ḥanīfa and his Companion and disciple Muḥammad Al-Shaibānī would protect the wife's inheritance claims by allowing her to observe whichever *'idda* proves to be longer. Abū Yūsuf, the other famous Companion and disciple of Imām Abū Ḥanīfa, maintained that, because the *ṭalāq* is irrevocable, the marital nexus is completely severed, except inasmuch as the divorcee can inherit provided the man dies during the *'idda* of *divorce*.

The period of gestation is reckoned in the case of a *revocable ṭalāq* as from the end of the *'idda* (not from repudiation), since a wife may be recalled by her husband by mere word or deed.

It has been established medically that a pregnant woman does not normally feel the movement of the baby in her womb before the eighth week of her pregnancy, i.e., some 126 days after conception.

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It has been established medically that a pregnant woman does not normally feel the movement of the baby in her womb before the eighteenth week of her pregnancy, i.e., some 126 days after conception.

The Qur'ān ordains that the *'idda* of widowhood is some 128 days. This is yet another instance of the Qur'ān's infinite wisdom or at least compatibility with modern science.

As for the expiry of the three menstrual cycles (i.e. the *'idda* of divorce), a *ḥadīth* attributed to the Prophet states: "Three matters have been delegated to (the judgement of) women: menstruation, purity and conception." Should the spouses differ as to the time of the material sexual intercourse, Imām Abū Ḥanīfa accepted the wife's testimony on oath, but the Imāmis allow the Qāḍi to accept her sworn allegation only in the absence of evidence (direct and circumstantial) to the contrary.

This dispute could arise, in theory, where the woman remarried (to another man, after observing the *'idda* of *ṭalāq*) and gave birth to a child within the first six months of her new marriage. The child would be attributed to the former husband in such a case *provided* that the birth took place within the maximum period of gestation; otherwise the child is attributed to neither. If more than six months elapsed since the second marriage, the child is attributed to the new husband even though the birth took place within the maximum period of gestation in relation to the former husband. The problem is theoretical in the Islamic system but very true of say the system of serial polyandry practised by some of the pagans of central Nigeria e.g., the Kadara tribes.

Al-Shāfi'ī maintained that if a woman claims that her *'idda* period is over, and nevertheless gives birth to a child six months or more later, then the child is attributed to the former (or late) husband, provided the mother has not remarried and the maximum period of gestation has not been exceeded. The reason is that the mother's claim operates as an estoppel against her only, and without prejudice to the interests of the child.

Marriage with a woman undergoing 'idda

The Egyptian Suburban Divisional Sharī'a Court declared on 2.8.1938 that a marriage to a pregnant woman was irregular (*fāsid*), and the decision was upheld on appeal.

The Lahore High Court at one time treated such marriages as void (*Jhandu* v. *Mst.Hussain Bibi* – 1933, 4 Lah. 192; *Mt. Rare* v. *Bagh Singh* – 1935, 157 I.C. 779); but in a later decision held that such a marriage is irregular, not void, and the children legitimate (*Muhammad Hayat* v. *Muhammad Nawaz* – 1935, ('35) A.L. 622),

because the impediment ceases on the expiration of the *'idda* period.

The Egyptian Sharī'a Court of Al-Labbān held that a remarriage to a triply divorced wife without an intermediary marriage to another man (to effect a *taḥlīl*) was only irregular, not void, and the issue legitimate. The decision was made on 7.5.1947 and confirmed on 7.12.1947 by an appellate court. It was stated in the judgment that Abū Ḥanīfa has laid down that a *shubha*, whether of *fi'l* (act), *mulk* or *maḥal* (possession or place), or *'aqd* (marriage contract), gives the *waṭ'* (intercourse) a semblance of validity which establishes and safeguards paternity. Abū Yūsuf and Muḥammad Al-Shaybānī disagreed with Abū Ḥanīfa in the case of *shubhat al-'aqd* if the parties were aware of the *ḥurma* (prohibition). The evidence before the court in this case, oral and documentary, established that neither party knew of the bar.[1]

Since the waiting period of divorced women lasted as long as they were pregnant, divorcees could claim, on the assertion that their *'idda* period was not yet completed, maintenance from their ex-husbands for a period of two years in Ḥanafī Egypt. Moreover, they would have the right to share in his estate if he died within this period, at least where the divorce was not of the final and irrevocable variety. Finally, children born to divorced or widowed women

1. A *ḥadīth* attributed to the Prophet states: "The *ṭalāq* of a concubine is two pronouncements, and her *'idda* is two menstruations." This is the Ḥanafī position in particular and the Sunnī view in general.
An interesting Kenyan case of paternity, *Aisha binti Vali and Nyanya binti Hamis* v. *Fatuma binti Shaabek* – 1902, E.A.L.R. 44, concerned the child of a woman who had been a concubine slave and was then given in marriage to another, who went straight from her master to her husband without waiting the requisite period of *'istibrā'*, and who gave birth to a child just eight months later. Here the Qāḍī held that the child, having been born more than six months after the marriage, belonged to the husband, while the then Shaikh al-Islam laid it down that, if the woman was in fact pregnant at the time of her marriage and her husband knew this, then the marriage was void and the child must be attributed to the master; while, if she was in fact pregnant but the husband had no knowledge of this, the marriage was valid but the paternity of the child must be decided either on grounds of resemblance or by the child's own option when it reached the necessary age. And this last point was echoed in another case (*Abdureman bin Khamis and Aisha binti Safi* v. *Khamis bin Malim* – 1918, 7 E.A.L.R. 110) where it was held that, when a child was acknowledged by two different men neither of whom could prove paternity, it might choose which he or she preferred as a father: Islamic Law in Africa: J.N.D.Anderson; 1954/70.

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within two years of the termination of their marriage possessed rights of maintenance against the former husband and the right (indefeasible under the Sharī'a law of succession) to take a major share in his estate.

It was the Egyptian legislation of 1920 and Law No.25 (Articles 15 and 17) of 1929 which set the pattern for reform in this branch of the traditional law. The legislation provided:

a. that one solar year was to be regarded as the maximum period of gestation, in the sense that no claim of maintenance or inheritance by the wife, and no claim of legitimacy on behalf of a child, resting upon an *'idda* of an allegedly longer duration would be entertained by the Courts;[1]
b. that proof of non-access between the spouses since marriage or for a year or more preceding the birth of a child would debar a claim of the legitimacy of a child born to the wife.

Prior to this, the Ḥanafī *fiqh* was adhered to, as could be seen from the decision of the Sharī'a Jamāliyya Court on 22.10.1927.

With some variations the Sudanese (March, 1935 – Judicial Circular No.41), Syrian (1953), Tunisian (1957), Moroccan (1958), Aden (1974) legislation follows these rules. In all countries one year is adopted as the maximum period of gestation – as a rule of substantive law rather than as a procedural requirement in the manner of the Egyptian and Sudanese legislation.

The Moroccan Law, however, provides that "If, at the end of the year, a doubt persists regarding pregnancy, the interested party shall bring the matter to the attention of the Court so that the assistance of medical experts may be invoked for a solution . . .". In Tunisia proof of non-access to rebut a claim of legitimacy is not restricted, as under the Egyptian and Syrian Laws, to the spouses' separation for a year or more prior to the birth of the child. The relevant provision enacts that a claim of paternity will not be established "in regard to a child born to a wife in circumstances in which it can be proved that the husband had no access to her, nor one born to a woman more than a year after her husband had left her . . .". It would appear that the traditional procedure of *li'ān*, though almost obsolete in practice is still in law available to a husband in order to disown a child when he cannot establish non-access within the above limits.

1. Uterine haemorrhage does not signify the end of the *'idda*: Case No.195, the Court of Karmūz, U.A.R., 26.1.1956.

The Tunisian Law, in fact, embodies a modern and streamlined version of *li'ān*. "If a husband disowns the child with which his wife is pregnant, or the child which is presumed to be his, this repudiation will not be effective without a decree of Court – and in such a matter all legal means of proof may be used . . . If the Court confirms the repudiation of paternity . . . it shall pass a decree of illegitimacy and of physical separation between the spouses."[1]

The jurisdiction of the Egyptian courts to determine questions of paternity was confined to cases in which the factual situation involved was not contrary to the notions of modern medical science concerning gestation. The authority of the traditional doctrine was not expressly or directly denied; it was simply that the courts had now no competence to determine cases which necessitated the recognition or rejection of that traditional doctrine. Dr.A.'Āmir in *Al-Aḥwāl Al-Shakhṣiyya*, 1961, maintained that the *'Adam Samā'* (refusal to hear) resorted to in Egypt and the Sudan was the result of a preference for employing a procedural device rather than a departure from the Ḥanafī *madhhab* by a process of an eclectic choice (*takhayyur*). Be that as it may, the solar year rule was probably based on the Mālikī lunar year of Muḥammad Ibn 'Abdul-Ḥakam. Moreover, when scientific progress can provide evidence which can establish the truth where otherwise there would be mere conjecture, it is right that the law should avail itself of this assistance unless there are strong grounds for objection.

The Cairo Court of First Instance on 20.1.1957 (Case No.1575) held that Article 99/4 of Law No.78 of 1931, which enacted that no matrimonial relief would be granted if the marriage is denied unless an official marriage certificate is produced or its existence is proved, does not extend to precluding the Courts from entertaining paternity cases, as the availability of a marriage document is not a condition precedent to settling cases turning on *nasab*.

The Jordanian Law of 1951 and the Iraqi Law of 1959 do not prescribe any maximum period of gestation, and proof of non-access is recognised as rebutting a claim of paternity only where it is a case of the spouses never having physically come together since the time of the contract of marriage. Thus Al-Qāḍī 'Alā' Al-Dīn Kharūfa of

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within two years of the termination of their marriage possessed rights of maintenance against the former husband and the right (indefeasible under the Sharī'a law of succession) to take a major share in his estate.

It was the Egyptian legislation of 1920 and Law No.25 (Articles 15 and 17) of 1929 which set the pattern for reform in this branch of the traditional law. The legislation provided:

a. that one solar year was to be regarded as the maximum period of gestation, in the sense that no claim of maintenance or inheritance by the wife, and no claim of legitimacy on behalf of a child, resting upon an *'idda* of an allegedly longer duration would be entertained by the Courts;[1]
b. that proof of non-access between the spouses since marriage or for a year or more preceding the birth of a child would debar a claim of the legitimacy of a child born to the wife.

Prior to this, the Ḥanafī *fiqh* was adhered to, as could be seen from the decision of the Sharī'a Jamāliyya Court on 22.10.1927.

With some variations the Sudanese (March, 1935 – Judicial Circular No.41), Syrian (1953), Tunisian (1957), Moroccan (1958), Aden (1974) legislation follows these rules. In all countries one year is adopted as the maximum period of gestation – as a rule of substantive law rather than as a procedural requirement in the manner of the Egyptian and Sudanese legislation.

The Moroccan Law, however, provides that "If, at the end of the year, a doubt persists regarding pregnancy, the interested party shall bring the matter to the attention of the Court so that the assistance of medical experts may be invoked for a solution . . .". In Tunisia proof of non-access to rebut a claim of legitimacy is not restricted, as under the Egyptian and Syrian Laws, to the spouses' separation for a year or more prior to the birth of the child. The relevant provision enacts that a claim of paternity will not be established "in regard to a child born to a wife in circumstances in which it can be proved that the husband had no access to her, nor one born to a woman more than a year after her husband had left her . . .". It would appear that the traditional procedure of *li'ān*, though almost obsolete in practice is still in law available to a husband in order to disown a child when he cannot establish non-access within the above limits.

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the Sunni Hanafi Shari'a Courts attributed (the case being confirmed on appeal on 21.12.1962 — Decision No.648) a child born within two years from the date of the *nikāh* to the husband, this being the traditional Hanafi law. The Qāḍi, it may be added, did not deem it fit to decide the issue of the husband's sterility raised by the wife petitioner as it was not in the interests of the parties, especially in view of the fact that the wife was in the husband's home at the material time.

The law currently applicable in India and Pakistan in this regard (as a result of the Evidence Act, 1872) is distinguished by the fact that the presumption of legitimacy arises in favour of a child "born during the continuance of a valid marriage". This means that the paternity of a child born a matter of weeks or even days after marriage will be attributed to the husband. Thus the six months' rule of traditional Shari'a law, which is still observed throughout the Near and Middle East, is no longer applicable in India and Pakistan. But A.Fyzee in 'Outlines of Muhammadan Law' (1965) says: "The question whether Section 112, Indian Evidence Act, supersedes the rules of Muhammadan law was left open in the leading case of *Muhammad Allahdi Khan* v. *Muhammad Ismail Khan* (1888) by Mahmood J., but since that time the trend of modern decisions is to regard this as purely a question of the law of evidence governed by Section 112, Indian Evidence Act, even with regard to Muslims. If, however, the marriage is held to be irregular, difficult questions may arise."

David Pearl in his Muslim Law (1979) states that in Sibt Muhammad v. Muhammad Hameed 1926 ILR, Ismail Ahmed Peepadi v. Momin Bibi AIR 1941 PC, (Mst). Rahim Bibi v. Chiragh Din AIR 1930 and Ghulam Mohy-ud-Din Khan v. Khizar Hussain 1929 ILR Section 112 was held to supersede Muslim law. He points out, however, that in Abdul Ghani v. Taleh Bibi (1962) PLD (WP) Lah 531 the view that the Hanafi law relates to evidence and was therefore superseded by the Evidence Act was not accepted. The Appelate court held that the rule of Muslim law in question was a rule of substantive law unlike the rule of evidence in s.112 under which only a presumption of legitimacy can be raised. In any case it would appear that in Pakistan Section 2 of the Shariat Act (1951) has reactivated the application of Muslim law as it states that legitimacy or bastardy is henceforth to be governed by Muslim law.

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related to the right of a Shī'a Muḥammadan widow to maintenance, and reliance was placed on the language of a particular verse of the Qur'ān to show that the widow entitled to maintenance independently of her share in the estate of the husband the Judicial Committee of the Privy Council (1897, 2 41.A. 196) remarked: "They do not care to speculate on the mode in which the text quoted from the Qur'ān (S.2. v.241-2) is to be reconciled with the law as laid down in the Hedaya and Baillie's Imamia. It would be wrong on *a point of this kind* to put their own construction in opposition to express ruling of commentators of such great antiquity and high authority."

Under the Indian Evidence Act a child born more than 280 days after the termination of a marriage will not be presumed to be the legitimate child of the husband – although this does not preclude the Court from adjudging such a child to be legitimate on the basis of evidence adduced by the party who seeks to establish legitimacy. Finally, in India and Pakistan, a claim of paternity may be rebutted by proof of non-access at any possible time of conception of the child.

A Bennigsen and C.Quelquejay in 'Islam in the Soviet Union' (1967), writing on the Muslim Family stated: "Under Soviet Law, polygamy is prohibited, but the press provides evidence of astonishing survival of a tradition in the following semi-legal form: only the first marriage is registered according to civil law, subsequent ones simply being solemnised in front of a mulla. In order that the children of these various marriages should be legitimate, they are all regarded as being the issue of the officially registered wife. She is therefore quickly provided with a numerous family from which she derives all the attendant advantages." Up till now only one Muslim country has prohibited polygamy outright, namely, Tunisia in 1957, but there is no evidence, at least so far, of the Central Asian pattern striking root.

The discussion of modern developments is concluded by a mention of two cases which reveal the eagerness of the Courts to confer the label of legitimacy. The Alexandria Court of First Instance, Case No.128, Session 18.11.1956, held that if a man acknowledges a child as his, there being no impediment to making such an *iqrār*, then, although the child may have been born less than six months after the marriage-contract, the spouses will be presumed to have been man and wife at the time of conception to safeguard paternity and the interests of the marriage; and this is the case even though the

conception had taken place during the *'idda* of a divorced wife of the husband and such divorced wife happened to be the sister of the new wife (i.e., despite unlawful conjunction). Moreover, the husband was prevented by the Court from going back on his acknowledgment.

The second case is a decision of the Sunnī Basra Sharī'a Court – 25.3.1963, (affirmed by Appeal No.186 – 13.5.1963). Here the wife respondent became a Muslim on 21.1.1962, and the husband petitioner on 19.12.1962, (i.e., nearly eleven months later). No *tafrīq* (divorce, literally separation, order) was issued. The woman was already pregnant when the man declared his conversion. Al Qāḍī A.A.Kharūfa, held that *nasab* must be safeguarded for the least *shubha*, and on the facts the husband had prepared a lawful matrimonial home. The wife respondent was accordingly ordered to submit to and obey the husband petitioner, and, moreover, to pay advocacy and litigation fees and costs.

Chapter 4
Medico – Legal Aspects of Succession

Authors invariably mention the hermaphrodite, but the juristic speculation on the share to be allotted is based on non-medical considerations *strictu sensu*. Moreover, the predominance of male or female chromosomes can today be decided with satisfactory scientific precision.

It is worth noting, however, that legal provisions normally enact that a hermaphrodite whose predominant sex cannot be determined will take whichever is less as between the portions to which it would be entitled if male or female – since to this alone it is certainly entitled and the shares of others must not be diminished by an uncertainty.

Another topic that has been rendered redundant is the *number* of embryos to be allowed for on distributing an estate. With the aid of an ultrasonic detector, it is possible to forecast with reasonable accuracy the number of babies expected on a multiple birth. Moreover, this subject is again not based on forensic medical considerations in the strict sense, the rules being details of the law of inheritance and bequests. In general, the portion of only *one* male or female is kept back because a single child is born in the vast majority of cases. Only a postmortem reveals today the sex of a viable foetus provided it is not drastically destroyed.

Some new techniques are being developed to determine the sex of the foetus by obtaining some blood corpuscles from the scalp of the foetus or foetal cells found in the amniotic fluid. The latter originate primarily from foetal ephithelium, buccal mucosa or are washed out in foetal urine. Analysis of such cells by Y – chromosome fluorescence and Sex Chromatin Study, can reliably identify the male from the female foetus. Modern ultrasonic equipment can also reliably (but not invariably) detect male genitalia of the foetus in utero. But the entitlement of the unborn child to inherit has been

ordained by the Sunna; Abū Dā'ūd and Abū Hurayra related that the Prophet said that if a baby is born alive, then it is to inherit.

The right to inherit depends on establishing that the heir was alive in fact or *in law*[1] at the time when the praepositus died (or was declared 'presumed dead' by the Court). Thus the child must be born alive within a period which establishes the fact that he was existent at the time of the *mu'arrith's* death. The limitation of this period is based on the longest period for which an embryo stays in his mother's womb and the shortest period after which it can be born alive. The Egyptian Law of Inheritance, Law No.77 of 1943 may be summarised as follows:

1. If the deceased leaves a *pregnant wife* and she bears a child in *not more than a solar year* from the date of his death the child is entitled to inherit (since this is regarded as establishing his existence at the time of his father's death together with his *nasab*).
2. If the deceased leaves a *pregnant mu'tadda* and she bears a child in *not more than a solar year* from the date of divorce the child is entitled to inherit (since this too is regarded as establishing his existence at the time of divorce and still more at that of death – so both *nasab* and existence are established).
3. If the deceased (*mu'arrith*) leaves a foetus other than his own *who would, if alive, be entitled to inherit, and if the mother of the mu'arrith* and unborn child is *mu'tadda* on account of either widowhood or divorce – then, if the child is born within not more than a solar year of the mother's widowhood or divorce, the child is entitled to inherit – since this establishes that the child was conceived while the marriage was still extant (so establishing *nasab*) and while the *mu'arrith* was alive.
4. If the deceased (*mu'arrith*) leaves a foetus other than his own who would, if alive, be entitled to inherit and the marriage of the mother of the *mu'arrith* and unborn child is still extant, then the child will only be entitled to inherit if born within nine months (or 270 days) of the *mu'arrith's* death – since in the majority of cases gestation only lasts nine months, and birth in less than nine months establishes in all probability its existence at the time of death. If birth occurs after this period his existence at the time of death is *not* established, and he will not be entitled to inherit. This nine month period, (the period formerly accepted had been six months, that being the Ḥanafī doctrine), corresponds with certain statements in the Ḥanbalī school – for Ibn Taimiyya, the Ḥanbalī jurist, in his book 'Al-Ikhtiyārat al-'Amaliya' (p.114) said: "A legacy to an embryo is valid and the analogy of the revealed text concerning divorce is that if it is born within nine months it is entitled to the legacy" – and legacy and inheritance are 'sisters' (i.e., closely related).

A child in embryo, for however short a period conceived, is a legal person in whom vest *also* rights to testamentary dispositions which are accepted on his behalf at his birth by his guardian. If the bequest is general in its wording, it may embrace anybody who qualifies at the time of the testator's decease who may have been *en ventre sa mère* at the time the legacy was made. But if the bequest is specific, the claimant must be alive at the time both of bequest and death. A bequest in favour of a child born before the testator's death was held valid in the Pakistani case of *Chauno Bi* v. *Muhammad Riaz* (1956) Lah.2132.

If the child is the product of *zinā* (illicit sexual intercourse) then it will only inherit in Sunnī law through the mother on account of their natural relationship. On the other hand, the Ithnā 'Asharī school treats the illegitimate child as *nullius filius*. But as the Shī'ī Imāmī jurist Al-Sayyid Muḥsin Al-Ṭābaṭibā'ī Al-Ḥakīm maintained on discussing the status of the issue of 'artificial' insemination, the

1. Indeed, the term 'children' in its primary sense means in English law descendants of the first degree, and includes children *en ventre sa mère*. Viability is the ability to acquire a separate existence, recognised in English law after the seventh month of gestation.

A stillbirth applies to any child "which has issued forth from the mother after the twenty-eighth week of pregnancy and which did not at any time, after being completely expelled from the mother, breathe or show any other sign of life."

A 'separate existence' is not quite synonymous with 'live-birth', for this implies only an emergence in a living state. A child has acquired an independent life by law only when it has "completely proceeded in a living state from the body of the mother and breathed or shown some other sign of a separate existence". The difference seems to be trivial, but in practice it is not, for a child is assumed to have been born dead until proved otherwise. No postmortem examination can prove that a child's heart *was* beating at birth (though it may infer, as in maceration, that it was not). Proof of mere birth in a living state is not possible even from autopsy. Autopsy examination may show, however, whether a child continued to live apart from the mother.

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product of insemination is a reality (sic), which is not the outcome of sin, and cannot be disowned of course by the mother, and is accordingly capable of inheriting from her (and vice versa).

Otherwise illegitimacy is a bar to inheritance even between uterine brothers. If two sons are born to a woman, one legitimate, the other not, they are not related as uterine brothers so as to inherit from each other: *Rahmatullah* v. *Maqsood Ahmad* (1950) (52) A.A. 640.

Death *'taqdīran'* is the case of an embryo born dead as a result of an assault on the mother. Such a death is not a true (*ḥaqīqatan*) death, since the latter consists in the loss of a *true* and full life, which the unborn embryo does not possess, nor is it a death by decree where a person is deemed dead (*ḥukman*): but Sharī'a law has made it incumbent on the wrongdoer (or his *'āqila*, i.e., *'aṣaba*) to pay blood-fine reckoned by most jurists as 1/20 of the ordinary *diyya* (or 50 dinars or 500 dirhams in the classical days). Blood money is only exacted in the case of a living being so it follows that the Lawgiver must have regarded the embryo or foetus as alive at the time of the assault and as having died as a result of it. A saying attributed to the Prophet states: "The soul is blown into the embryo when it is some 120 days old." As a consequence a difference arose among jurists as to whether or not the embryo could in these circumstances inherit and pass inheritance.

All the Sunnī schools, and the Imāmīs (according to Al-Lam'a Al-Dimashqiyya), regard this blood money (known as *ghirra* or *arsh*) as belonging to the child itself,[1] and therefore transmissible to its own heirs, while the Ḥanafīs further maintained that the child, because its legal existence is assumed by the *ghirra* rule, should inherit and pass to its heirs any other property which it would certainly have inherited had it in fact been born alive. Under the Egyptian Law of Inheritance, 1943, however, the child itself does not acquire and pass to its heirs either the *ghirra* or, *a fortiori*, any other property, but the mother alone is entitled to the blood-fine

1. On 31st October 1979 a judge in Belfast, Northern Ireland, ruled that an unborn child is a person and awarded damages to a child who was born with bullet fragments in her back. He said: "I am satisfied that in this jurisdiction an unborn child has the right to sue for damages when born". In 1964, the Court of Appeals of Maryland, in a split decision, allowed an action for prenatal injury in which the 'plaintiff' was born dead. The Connecticut Supreme Court has held that the representative of a stillborn child whose death was caused by injuries suffered while it was a viable foetus, may sue the one who did the wrong.

for her still-born child, which is thus regarded as compensation or requital payable for damage to the body of the mother herself, (the miscarriage of her embryo being regarded as the destruction of a part of her person). Rabī'a ibn-Abī-'Abd al-Raḥmān and al-Laith ibn-Sa'd, both scholars of Medina who died in the early eighth century A.H., are the alleged authorities for this rule.

The *ḥadīth* suggests that the embryo is alive when some 120 days old. As was explained when analysing the *'idda*, the Qur'ānic 'idda of widowhood implies an age of 128 days (18 weeks) and medical science has established that the foetus starts moving in the uterus (or womb) *after* some 126 days. The infinite knowledge of the Qur'ān is obviously not accessible in its entirety except to the Almighty. But in so far as it has been vindicated on many a score, to the believer it can provide the interlocutions and final solutions to many an impasse. Thus the time an embryo is to be deemed alive in law becomes a less bewildering dilemma for a Muslim once the Qur'ān is consulted for the Truth.

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Otherwise illegitimacy is a bar to inheritance even between uterine brothers. If two sons are born to a woman, one legitimate, the other not, they are not related as uterine brothers so as to inherit from each other: *Rahmatullah* v. *Maqsood Ahmad* (1950) (52) A.A. 640.

Death *'taqdīran'* is the case of an embryo born dead as a result of an assault on the mother. Such a death is not a true (*baqīqatan*) death, since the latter consists in the loss of a *true* and full life, which the unborn embryo does not possess, nor is it a death by decree where a person is deemed dead (*ḥukman*): but Sharī'a law has made it incumbent on the wrongdoer (or his *'āqila*, i.e., *'aṣaba*) to pay blood-fine reckoned by most jurists as 1/20 of the ordinary *diyya* (or 50 dinars or 500 dirhams in the classical days). Blood money is only exacted in the case of a living being so it follows that the Lawgiver must have regarded the embryo or foetus as alive at the time of the assault and as having died as a result of it. A saying attributed to the Prophet states: "The soul is blown into the embryo when it is some 120 days old." As a consequence a difference arose among jurists as to whether or not the embryo could in these circumstances inherit and pass inheritance.

All the Sunnī schools, and the Imāmīs (according to Al-Lam'a Al-Dimashqiyya), regard this blood money (known as *ghirra* or *arsh*) as belonging to the child itself,[1] and therefore transmissible to its own heirs, while the Ḥanafīs further maintained that the child, because its legal existence is assumed by the *ghirra* rule, should inherit and pass to its heirs any other property which it would certainly have inherited had it in fact been born alive. Under the Egyptian Law of Inheritance, 1943, however, the child itself does not acquire and pass to its heirs either the *ghirra* or, *a fortiori*, any other property, but the mother alone is entitled to the blood-fine

1. On 31st October 1979 a judge in Belfast, Northern Ireland, ruled that an unborn child is a person and awarded damages to a child who was born with bullet fragments in her back. He said: "I am satisfied that in this jurisdiction an unborn child has the right to sue for damages when born". In 1964, the Court of Appeals of Maryland, in a split decision, allowed an action for prenatal injury in which the 'plaintiff' was born dead. The Connecticut Supreme Court has held that the representative of a stillborn child whose death was caused by injuries suffered while it was a viable foetus, may sue the one who did the wrong.

for her still-born child, which is thus regarded as compensation or requital payable for damage to the body of the mother herself, (the miscarriage of her embryo being regarded as the destruction of a part of her person). Rabī'a ibn-Abī-'Abd al-Raḥmān and al-Laith ibn-Sa'd, both scholars of Medina who died in the early eighth century A.H., are the alleged authorities for this rule.

The *ḥadīth* suggests that the embryo is alive when some 120 days old. As was explained when analysing the *'idda*, the Qur'ānic 'idda of widowhood implies an age of 128 days (18 weeks) and medical science has established that the foetus starts moving in the uterus (or womb) *after* some 126 days. The infinite knowledge of the Qur'ān is obviously not accessible in its entirety except to the Almighty. But in so far as it has been vindicated on many a score, to the believer it can provide the interlocutions and final solutions to many an impasse. Thus the time an embryo is to be deemed alive in law becomes a less bewildering dilemma for a Muslim once the Qur'ān is consulted for the Truth.

Chapter 5

Abortion, Gestation and Viability

The abortion law in Kuwait was amended in January 1982 to permit abortion where either grievous bodily harm to the mother is imminent or if it is proved that the baby to be born will suffer from incurable brain damage (or severe mental retardation). There are procedural safeguards such as the need for the approval of three consultant physicians who will presumably include obstetricians and gynaecologists. In the case of incurable brain damage to the foetus the consent of the parents is also required for the abortion.

There is authority in Islamic Law for the legalisation of abortion in extreme circumstances which mainly revolve round the survival of the mother. Al-Shaikh Shaltūt in Al-Fatāwā (Juridicial Opinions) opines that the general principles of Sharīa opt for the lesser harm and if one is presented with a (Hobson's) choice between saving the mother by losing the foetus or continuing the pregnancy then the foetus is sacrificed as the mother is the source and origin (aṣl) and is a full fledged life in contradistinction to a child en ventre sa mère not yet enjoying full rights and obligations.

Islamic Law ordains in the case of an unjustified miscarriage of a foetus compensation of a lesser magnitude than that specified in homicide cases. The blood fine for foeticide is reckoned by most jurists as one twentieth the ordinary Diyya. The Diyya in the case of an embryo or foetus is the ghirra already mentioned. Al-Shaikh Yūsuf Al Qarḍāwī wrote in his book "The Permissible and Ḥarām in Islām" (Arabic text) that if as a result of an attempted miscarriage a live birth results to start with and death ensues later then the full Diyya is payable. Only the ghirra is payable if it is still-born.

The normal condition endangering the life of a mother is Eclampsia and pre-Eclampsia (or toxemia of pregnancy) and even in such cases the birth is normally prematurely induced or a caesarian section could be performed.

A common source of severe deformities is the contacting by the mother of German measles in the second month of pregnancy. It

may be added that Islamic jurisprudence takes a more serious view of miscarriage once the embryo is 120 days old or over, as the ḥadīth indicated that the embryo is endowed with soul when 120 days old. As the embryo becomes a foetus when its features become more distinctive in the 9th week it would seem that the penalty could be greater for foeticide than for embryulcia.

With the development of special care units for premature new borns it has been possible to reduce the age of viability of the new born foetus and when these techniques are perfected it may transpire that the minimum age of viability could drop to 120 days. If it does, this would be compatible with the ḥadīth. The minimum period of gestation which is laid down by Islamic law has in fact no medical equivalent. The period of gestation in medicine simply means the period spent in the uterus. The minimum period of gestation in Islamic law has a direct bearing on and reference to legitimacy including conception during wedlock. It could be that, in the distant future, the minimum period of gestation of 6 lunar months will prove to be the minimum period compatible with non-induced or non-assisted viable births. 120 days may prove to be the minimum period of gestation for a live birth and separate existence induced and assisted by modern technology.

As the French Surgeon and Orientalist Maurice Bucaille wrote in 'La Bible, le Coran et la Science' (1976) the most fundamental stage in the history of embryology was Harvey's statement (1651) that 'all life initially comes from an egg'. At this time, however, when nascent science had nevertheless benefitted greatly from the invention of the microscope, people were still talking about the respective roles of the egg and the spermatozoon . . . More than a 1000 years before our times at a period when whimsical doctrines still prevailed, men had a knowledge of the Qur'ān. The Statements it contains express in simple terms truths of primordial importance which man has taken centuries to discover . . . In view of the level of knowledge in the Prophet Muḥammad's day it is inconceivable that many of the statements in the Qur'ān which are connected with science could have been the work of the man. It is, moreover, perfectly legitimate not only to regard the Qur'ān as the expression of a Revelation, but also to award it a very special place, on account of the guarantee of the authenticity it provides and the presence in it of scientific statements which, when studied today, appear as a challenge to explanation in human terms.

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Chapter 6

Reflections: Brain Death and HLA

Two of the current developments in forensic medicine will sooner or later attempt to claim a place in Islamic medical jurisprudence. One is related to some of the foregoing analysis namely paternity testing and the other is as to how death should be determined.

Paternity Testing

The frequency of most HLA antigens is so low that if the putative father is not excluded, one can usually calculate that he is very likely to be the biologic father as compared with any other male. The usefulness of HLA for paternity testing has been recognized in a recent joint statement of the American Medical Association and the American Bar Association. HLA typing is recommended as the next step if red cell typing does not provide sufficient information. Trial courts in America are beginning to admit this type of evidence, but the courts are not yet required as a matter of law to admit evidence about the probability that a defendant is the biologic father in contrast to evidence ruling out that possibility.

As such advanced techniques become even more accurate in the West and available in the Muslim world, it may be that countries such as Tunisia and Aden will decide to use them in addition to the application of the presumptions and rules in the Islamic manuals. It is rather early in the day to speculate however.

Definition of Death

Should death be determined by the brain or the heart. It is argued by some that death should be determined by the brain and not by the heart. At present a patient is certified dead when his breathing ceases and his heart stops beating. However, it has long been known that an animal may be dead even when its heart is still beating. This problem of when to certify a person dead happens most frequently

in cases where the patient has head injuries. He is usually in a coma and his brain is dead. However, his heart is still functioning through the respirator machine. There are many occasions where a patient who has brain death is sustained through respirators.

It is important for the law to know when one is legally dead assuming a distinction can be drawn when a person is legally dead and when medically dead. For example, a Western Parliament may enact that a person is legally dead on brain death and yet medically he may be in an intensive care unit with no hope of any useful recovery whatsoever. Thus he is only legally dead but medically still surviving or being ventilated. The distinction may be made in Western societies on when to certify the time of death — whether it is when the patient's brain is dead or when his life-supporting respirator is switched off.

The actual time of death has an important bearing on matters involving estate duties and property inheritance. The value of the person's estate for death duty purposes is assessed at the open market value at the time of legal death. What will a doctor do in a situation when a patient has brain death but is sustained on a respirator? Will he accede to the relatives of the rich patient's request to defer disconnecting the machine because the existing property and stock prices are too high which means the estate duty will be too steep? Another instance when the precise time and date a person is certified dead is important is in the law of succession of estates.

Because Islamic law has religious foundations, it is most unlikely that the concept of legal death as distinct from medical death will ever be accepted for the soul is viewed with reverence and the will of the Almighty with veneration. There shall in any case be violent opposition to the loss by Islamic jurisprudence of its pristine purity and to the encumbrances of callous technological realities. However in one area of succession namely succession to the throne it is envisaged that brain death rather than medical death will be the determining factor and brain death could be the time for the passing on of duties of state as opposed to estate duties.

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Glossary

'Adl – *A competent witness fulfilling the requirements of the law, including rectitude of character.*
'Ālim – *Learned in jurisprudence.*
'Aqd – *Contract*
'Aqlanat al-Ghaibiyyāt – *Rationalisation of the transcendental or supernatural.*
Arsh – *Compensation for a wound.*
Asbāb al-Nuzūl – *the causes of the revelation.*
Asnād – *(singular, Sanad) Statement of chain of authorities in a tradition of the Prophet.*
Bāṭil – *Void.*
Bayyina – *Proof positive.*
Dāya – *Midwife*
Diyya – *Blood money payable in respect of homicide.*
Fāsid – *Irregular; Invalid.*
Fatwā – *A juridical opinion.*
Fi'l – *act.*
Fiqh – *Jurisprudence.*
Ḥadd – *A prescribed penalty for certain specific offences.*
Ḥadīth – *A precept of the Prophet.*
Ḥarām – *Forbidden by law; taboo.*
'Idda – *The period during which a divorced or widowed woman may not re-marry.*
Ijmā' – *A juristic consensus.*
Ijtihād – *The independant deduction of some rule of law from the recognised sources.*
Ilhām – *Inspiration.*
'Illa – *Effective cause (on which ta'līl is based).*
Iqrār – *Acknowledgment (usually of paternity). Also admission or confession.*

Irtikān – *The theory of the dormant foetus; l'enfant endormi.*
Istibrā' – *'idda of a concubine.*
Lafẓan lā ma'nā – *Linguistically but not as to meaning.*
Li'ān – *The procedure by which a husband charges his wife with adultery, normally when the latter is caught in flagrante delicto; imprecation.*
Madhhab – *Doctrine; school of jurisprudence.*
Mafqūd – *A missing person about whom no further news is obtainable.*
Majbūb – *Without penis.*
Mut'a – *Temporary marriage permitted by the Ithnā 'Asharīs.*
Nasab – *Blood relationship.*
Naskh – *Abrogation, repeal, supersession.*
Naṣṣ – *Text.*
Qābila – *Midwife*
Qāḍī – *Sharī'a Judge.*
Qā'if – *A member of a class of seers whose business it was to assign paternity according to the child's features.*
Qiyās – *Reasoning and deduction of rules of law by analogy with Qur'ān, Sunna and Ijmā'.*
Qurū' – *Periods of purity.*
Ruwāt – *Narrator.*
Ṣaḥīḥ – *Correct; Valid. Also a compilation of the Sunna.*
Shubha – *Semblance or doubt.*
Ṣigha – *Form of contract.*
Taḥlīl – *The making of something or someone lawful, for example, a triply divorced woman may once more marry her former husband provided she is first married to (and divorced by) a muḥallil. Consummation of the marriage with the muḥallil is required for reunion with the previous husband.*
Takhayyur – *Eclectic choice.*
Takhṣīṣ – *Limitation or specification (of a general proposition).*
Ṭalāq – *Dissolution of marriage by the husband. Repudiation or divorce. In classical Sharī'a this is extra-judicial although normally registered with a Qāḍī. Many Muslim countries by legislation based on al-Siyāsa al-Shar'iyya have made ṭalāq effective only through the courts.*
Taqyīd – *Restriction.*
Ta'zīr – *A doctrine of punishment; (literally) disgracing.*

Ṭuhr — *Purity.*
'Urf (also 'ādа) — *Usage; Custom.*
Waṭ' — *Intercourse.*
Waḥy — *Inspiration.*
Zinā — *Illicit sexual intercourse.*

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